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# THE PRACTICE

OF THE

# SHERIFF COURT OF SCOTLAND

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# THE PRACTICE OF THE SHERIFF COURT OF SCOTLAND

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# PREFACE

THE passing of the Sheriff Courts Act of 1907 may, with but little exaggeration, be said to have inaugurated a new era in the history of the Court. By an unhappy coincidence, the dawn of that era almost synchronised with the passing away of one whose name for well-nigh a generation was intimately associated with the Court, which his wide erudition and high personal character did so much to dignify and adorn, and whose Treatise on its Law and Practice was not only recognised as the standard authority on the subject, but had justly come to be regarded as a classic in our legal literature. But one, and perhaps not the least, result of the alterations and amendments effected by the Act has been to render existing Treatises all but useless, if not actually misleading, as guides to present practice. It must ever remain a matter of lasting regret that the profound learning, ripe scholarship, and wide judicial experience of the late Professor Dove Wilson were not available in the preparation of a new or amended Treatise on a subject which he had made peculiarly his own. But in view of the almost revolutionary character of the changes in this branch of the Law effected by the Act, the Author ventures to hope that a new Treatise on the subject stands in need of little or no apology for its appearance. In attempting to supply the place so long and honourably occupied by "Dove Wilson," as the work was affectionately known to every practising Scots lawyer, the Author is, however, acutely conscious of having undertaken a task of such magnitude as perhaps to lay him open to a charge of temerity.

No treatise at the present day can be written on the subject of the Law and Practice of the Sheriff Court whose author, consciously or unconsciously, is not under profound obligations to Professor Dove Wilson's standard work. The Author therefore gratefully takes this opportunity of expressing his deep sense of that indebtedness

generally. While, however, he has felt himself at liberty to use, and where necessary to incorporate in the text, much of the work of his distinguished predecessor, he desires to guard his readers against the assumption that the present volume is entitled to merit the distinction of being considered a new edition of that treatise, or that for the statements contained in the text, other than those for which his authority is directly invoked, his predecessor can in any way be justly held responsible.

That many of the statutory provisions stand in need of judicial construction and interpretation appears to be indisputable. It is much to be regretted that at the date of going to press not a single opportunity of obtaining a decision of the Supreme Court on the interpretation of the provisions of the Act had presented itself, though the Author congratulates himself on the fact that he has been able to incorporate a reference to one or two decisions while the volume was actually in the press. The Author is fully aware of the disadvantages which must necessarily accrue to the book, in so far as it deals with statutory provisions in the interpretation of which practically no illumination from decisions of the Supreme Court has been shed. Some time must, however, elapse before any considerable body of such decisions can be incorporated in the reports or referred to in the text, and meantime the Author understands that there is a widely expressed desire for a book on lines similar to those attempted in the present volume.

While, of course, the book must be judged upon its merits, it may not be amiss to offer a word of explanation with reference to matters which have been omitted. The aim of the Author has been to supply Practitioners in the Sheriff Court with a handy volume suited to the requirements of every-day practice. Historical matter, however interesting to the student, has therefore been generally omitted, except where its inclusion appeared to be absolutely essential to a proper understanding of the subject. For a similar reason no attempt has been made to deal with the varied ministerial and executive powers and duties conferred upon the Sheriff under numerous and ever-increasing Acts of Parliament, with which in everyday practice the general practitioner has but little or no concern. Nor have such subjects as Bankruptcy, Workmen's Compensation, and Succession been dealt with, partly because to have treated such subjects in anything like the manner which their

importance demands would have entailed an expansion of the book beyond all reasonable limits, but chiefly because as substantive branches of the law they have already received independent and exhaustive treatment in recently published volumes which are readily accessible. As originally projected, the volume was intended to contain an Appendix of Forms, both of initial writs and of condescendences and pleas-in-law. The size of the book, which has assumed somewhat larger dimensions than was originally anticipated, has, however, militated against this project, which is (it is hoped) reserved for subsequent treatment in a separate volume.

It remains for the Author to express his sense of indebtedness for assistance received in the preparation of the volume. Of the many works to which he is under obligation he ventures to single out for special recognition Sheriff Watson's erudite edition of Bell's Dictionary; Mr. Mackay's monumental work on the Practice of the Court of Session; and his friend Sheriff Lees' popular and scholarly Handbook of Pleading. His most grateful acknowledgments are specially due to Mr. F. G. Mackillop, M.A., LL.B., Writer, Glasgow, who has not only, in the midst of professional labours, most generously read over the whole of the proof-sheets of the volume while they were passing through the press, but whose wide and accurate knowledge of the Law and Practice of the Sheriff Court has enabled him to supply the Author with a number of exceedingly valuable suggestions, which (where possible) have been either incorporated in the text or referred to by way of note. To his friend Professor Rankine, K.C., the Author's thanks are due in no small measure for his kindness in reading the proof-sheets of the Chapter dealing with Removings, a kindness which it need hardly be said confers upon that Chapter a value which it could not otherwise have hoped to possess. The Author's thanks for much kindness are also due to his friends, Messrs. Dan. and J. N. Mactaggart, Solicitors, Campbeltown.

W. W.

CAMPBELTOWN, *April* 1909.

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# PART I

## THE CONSTITUTION AND JURISDICTION OF THE SHERIFF COURT

# SECTION I

## THE CONSTITUTION OF THE COURT

## CHAPTER I


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### I. The Court

Though relatively to the Court of Session, the Supreme Court of Scotland, its *status* is that of an inferior, the Sheriff Court is nevertheless alike as regards its jurisdiction and its powers, which in many respects rival those of the Supreme Court, one of the two Superior Courts of the country. The Sheriff Court is the product of development, by a process of slow evolution from remote times, of an institution which in its inception bore little resemblance to, and indeed both in its jurisdiction and its powers differed almost radically from, its modern representative. In this respect it differs from its analogue, the County Court of England, which is a comparatively modern institution, largely if not indeed entirely the creation of modern statute, and possessed of and regulated by a complete and homogeneous statutory code of rules, orders, and forms. As might therefore be anticipated in the case of an

institution which owes its being, not to the conscious and deliberate adaptation of definite means to a preconceived end, but to a process of evolution, the Sheriff Court bears the traces of its origin and development in possessing many anomalous features, and in showing some unexpected and, but for our knowledge of its growth, inexplicable contradictions. Many statutes within comparatively recent years have been passed, some curtailing but most of them extending and consolidating the powers and jurisdiction of the Court, the most recent of which, while to some extent consolidating and codifying the law relating to the Procedure and Practice of the Court, still further enlarged its powers and usefulness. But that Act, while effecting many important alterations, amendments, and improvements in precedure, and generally conducing to the greater efficiency and utility of the Court, has, as will be seen later, left untouched many of the anomalies with which its practice and jurisdiction have become surrounded.

## II. The Judges

The Judges in the Sheriff Court consist ordinarily of two officials, the Sheriff and the Sheriff-Substitute, to distinguish between whom the former is generally and colloquially, but now improperly, designated the Sheriff-Principal. Originally the office of Sheriff was, or at any rate at a very early date became, hereditary, with the result that the hereditary holders of the office, generally and almost necessarily incapable of performing its duties, obtained authority to delegate these duties to a depute chosen from the legal profession, after the profession became organised, for whom they were responsible. On the abolition of hereditary jurisdiction, the Sheriffs-Depute, having no superior, naturally succeeded to the position and duties of those whose functions they had performed, and continued to be designated by their former title, Sheriff-Depute. But by a subsequent Act[1] the title of Sheriff-Principal was substituted for that of Sheriff-Depute, and until the passing of the recent Act that designation continued to be both the popular and the correct legal designation of the holder of the office. The recent Act, while it does not in terms abolish the title, gives no sanction for its use, while in practice both judges have gradually become, and may be expected in the

[1] 9 Geo. IV. c. 29.

future to be universally, referred to as the Sheriff. In this work, therefore, as in popular parlance and in accordance with statutory sanction, the word Sheriff without qualification is used to denote both judges, except in such instances as the context renders it necessary to make a distinction.

**The Sheriff** is appointed by warrant under the Royal sign-manual, exercised upon the recommendation of the Secretary for Scotland.[1] He must now, to be eligible for the office, be either an advocate of at least five years standing, or, if not an advocate, he must have occupied the position of salaried Sheriff-Substitute for at least five years preceding the date of his appointment.[2] Prior to the passing of the Act, the Sheriff was necessarily a member of the Faculty of Advocates, his qualification being that of an advocate of not less than three years standing, who at the date of his appointment was either acting as a Sheriff-Substitute or was in practice before and in regular attendance upon the Court of Session,[3] or if not in actual practice, was at least in habitual attendance upon the Supreme Court.[4] Since, as will subsequently be seen, a solicitor of not less than five years standing in his profession is eligible for appointment as a Sheriff-Substitute, and as a Sheriff-Substitute of five years standing is eligible for appointment as a Sheriff, the office of Sheriff is now for the first time in its history open to others than members of the Faculty of Advocates. With the exception of those of the Lothians[5] and Lanarkshire, who are required to reside within six miles of Edinburgh and Glasgow respectively, the Sheriffs, unlike the Sheriff-Substitutes, are not debarred from private practice except in causes which have either arisen within or come from their respective Sheriffdoms,[6] nor are they required to reside within their Sheriffdoms. The contingency of the appointment as Sheriff of a Sheriff-Substitute possessed solely of the qualification of a law agent, at least to any other Sheriffdom than those of Lanarkshire or the Lothians, is perhaps somewhat remote, but it appears to be at least competent. In the event of such an appointment, since he is not debarred from private practice, it would, however, appear to be competent for its holder to engage in business as a solicitor and to

[1] Act, s. 11.
[2] Act, s. 12.
[3] 1 & 2 Vict. c. 119, s. 2.
[4] 50 & 51 Vict. c. 41.
[5] The Sheriff of the Lothians does not, however, appear to be debarred from private practice.
[6] Act, s. 21.

appear as an agent in the Sheriff Court, though not in that of which he is the titular head; without obtaining admission as a member of the Faculty of Advocates he could not, solely by virtue of his office, appear, at least as Counsel, in a cause in dependence before the Supreme Court. Provision is directly made by the Act prohibiting a Sheriff-Substitute from engaging in legal or other private practice or business, or from acting directly or indirectly as a Procurator before any Court; but no such restriction is, in terms, imposed upon the Sheriff, his sole disability, other than those to be mentioned, being that he is ineligible to act as steward, chamberlain, factor, agent, or commissioner to any one whomsoever, or to act in the employment of any one acting in any of these capacities.[1] The tenure of office of the Sheriff is *ad vitam aut culpam*, but the Secretary for Scotland may, upon a report prepared solely[2] at his instance by the Lord President and the Lord Justice-Clerk for the time being, declaring that a Sheriff is, by reason of inability, neglect of duty, or misbehaviour, unfit for his office, issue an order for his removal from office. Such an order must, however, lie before both Houses of Parliament for at least four consecutive weeks while Parliament is sitting, and becomes operative only if during that period neither House resolves that it shall not take effect.[3] The judicial, as opposed to the executive and administrative,[4] duties of the Sheriff are now mainly, and indeed almost exclusively, those of an appellate judge, though it is still competent, and in certain cases obligatory, for him to hold Courts and exercise the functions of a judge of first instance. The Secretary for Scotland may from time to time prescribe the duties which the Sheriff is required to perform personally, and he may also from time to time prescribe the number of Courts to be held by the several Sheriffs, and the times and places for holding such Courts.[5] But each Sheriff, with the exception of those for the Lothians and Peebles and for Lanarkshire, must, unless prevented by indisposition or other unavoidable cause, annually hold in his Sheriffdom Courts for the discharge of judicial business, due notice of the times and places of their sitting being given by him, which Courts must continue to sit until all the business before them has

[1] Act, s. 21.

[2] Formerly such a report might be requisitioned by four freeholders within the Sheriffdom, or by the Lord Advocate.

[3] Act, s. 13; *re-enacting* 61 & 62 Vict. c. 8, s. 1.

[4] For a full and accurate account of which *see* art. in Green's *Encyclopædia*.

[5] Act, s. 18.

been finally disposed of. And, unless otherwise prescribed, each Sheriff, with the exceptions mentioned, must at least once in the year go on the Small Debt Circuit, usually held by the Sheriff-Substitute, on which occasions, in addition to holding the Small Debt Court, he must undertake and dispatch as much of the ordinary business of the Court as may be ready for adjudication and as time may permit.[1] He must further, within ten days after the 12th of November in each year, make a return to the Secretary for Scotland of the number of Courts and sittings held by him, and the periods of holding each such Court, in the immediately preceding year, stating the cause of his absence in the event of his failure to hold the prescribed Courts.[1] The salary of the Sheriff is paid out of the Consolidated Fund, payable by quarterly instalments, and in each case is such as to the Treasury may seem meet, there being no restriction now, as formerly,[2] as to the limit of the salary payable.[3] He is entitled, if from age or permanent infirmity he become disabled from the due exercise of his office, or if he be removed from office on account of inability, to a pension varying in amount according to the length of his tenure of office.[4] The Sheriff is the returning officer in Parliamentary Elections, and in addition to other disabilities and disqualifications he is incapable of being elected or of sitting and voting as a Member of the House of Commons, and he is not entitled to exercise the Parliamentary franchise within his Sheriffdom. He cannot, of course, act either directly or indirectly as an agent for any candidate in any matter connected with, or incidental to, any election for the county with which he is officially connected.[5] There is a presumption that any duty statutorially imposed on a Sheriff may be equally discharged by his Substitute.[6]

*Interim Sheriff.*—The Secretary for Scotland, on an application being made to him by or on behalf of any Sheriff for leave of absence on account of temporary illness or other reasonable cause, may grant such leave of absence for any period which he may consider proper, and appoint another Sheriff (but not a Sheriff-Substitute), or an advocate of not less than five years standing, who need not necessarily be in practice, to act as interim Sheriff in such Sheriff's place and

[1] Act, s. 18.
[2] 16 & 17 Vict. c. 80, s. 37.
[3] Act, s. 14.
[4] *See infra*, Sheriff-Substitute.
[5] Act, s. 21; Reform Act, 1832, s. 36.
[6] Fleming *v.* Dickson & Others, 1862, 1 M. 188.

during his absence.[1] A Sheriff appointed to be interim Sheriff in another Sheriffdom does not, by accepting such interim appointment, vacate his office.[1] An interim Sheriff possesses all the powers and privileges, and may competently perform all the duties, of the Sheriff, and his acts, orders, and judgments have the same force and effect as those of the Sheriff. But an interim Sheriff does not, like an interim Sheriff-Substitute, receive his emolument from the Treasury, but is paid a fixed proportion, varying according to the length of his tenure of office, of the Sheriff's salary, the precise amount of which is fixed at the discretion of the Secretary for Scotland.[1]

**The Sheriff-Substitute,** like the Sheriff, is appointed under the Royal sign-manual, exercised upon the recommendation of the Secretary for Scotland.[2] He must be either an advocate of at least five years standing, or a duly qualified law agent within the meaning of the Law Agents (Scotland) Act, 1873, of a similar standing in his profession.[3] His tenure of office is, like that of the Sheriff, *ad vitam aut culpam.* He may, however, be removed from office by the Secretary for Scotland, upon the report of the Lord President and the Lord Justice-Clerk for the time being, for inability or misbehaviour.[4] He does not, however, like the Sheriff, appear to be removeable from office for neglect of duty, unless neglect of duty can be construed as the equivalent of, or as inferring, misbehaviour. And while in the case of the Sheriff the Act prescribes that the report on which his removal is founded must proceed on the requisition of the Secretary for Scotland, no such provision is enacted with reference to the Sheriff-Substitute. Presumably, therefore, the report may be prepared on the requisition of any person who can qualify an interest. The decision of the Secretary for Scotland is final, and does not, as in the case of the Sheriff, require to be brought formally to the cognisance of Parliament, though of course his decision, like that of any of the great Officers of State, exercised in the public interest and outside the purely departmental affairs of their office, is subject to the review of the Imperial Parliament.[5] The

[1] Act, s. 15.
[2] Act, s. 11.
[3] Act, s. 12.
[4] Act, s. 13.
[5] The provisions with reference to the tenure of the offices of Sheriff and Substitute were contained in separate Acts (61 & 62 Vict. c. 8, and 40 & 41 Vict. c. 50), and while the Acts themselves were repealed, their provisions were re-enacted practically without alteration. It is difficult to see any principle for perpetuating unnecessary distinctions.

Sheriff-Substitute, like the Sheriff, is appointed not for any portion or district of a county, but for the county as a whole, and his jurisdiction and authority are conterminous with those of the Sheriff;[1] but, unlike the Sheriff, he is bound to reside within his Sheriffdom,[2] the particular part of the shire at or near which he is required to take up residence being specified in his commission on appointment. But the Secretary for Scotland may from time to time prescribe the places at which Sheriff-Substitutes respectively are required to reside and to attend for the performance of their duties, and the number of Courts to be held by them, as well as the times and places for the holding of such Courts.[3] He may also from time to time prescribe the number of Sheriff-Substitutes in the several Sheriffdoms and the duties which such Sheriff-Substitutes are required to perform.[3] He may further, if he sees fit, direct that the Sheriff-Substitute of one county shall perform the duties of a Sheriff-Substitute in an adjacent (though, apparently, not necessarily a conterminous) county, such direction being equivalent in all respects to a commission to act in such adjacent county in favour of the Sheriff-Substitute so directed.[3] The powers conferred on the Secretary for Scotland are optional, and in so far as they remain unexercised the power to arrange the business within the limits of his jurisdiction and to distribute the work amongst the various Sheriffs-Substitute remains with the Sheriff of each particular county. A Sheriff-Substitute may not absent himself from his Sheriffdom for more than six weeks in any one year, nor for more than two weeks at any one time, nor so as to interfere with the regular sittings of his Court, without the special consent in writing of the Sheriff, who, in the event of his giving such consent, is bound either to attend personally during the Sheriff-Substitute's absence, or to appoint in his stead another person possessing the qualifications necessary for a Sheriff-Substitute on his appointment.[4] No provision is made with reference to the remuneration of a person so temporarily appointed by the Sheriff, which presumably is left to amicable arrangement between the parties. The Sheriff-Substitute possesses the same disabilities and disqualifications as does the Sheriff, and in addition is disqualified

[1] *See* Thomson *v.* Thomson, 5 S. L. Rev. 105; Tait *v.* Johnston, 1891, 18 R. 606.

[2] *See* 1 & 2 Vict. c. 119, s. 5.

[3] Act, s. 19.

[4] Act, ss. 19 and 12.

from engaging in legal, banking, or other private practice or business, or from acting directly or indirectly as a procurator before any Court, or from being in partnership with any person so acting. He is besides ineligible for appointment to any office except such as are, or may be, statutorily attached to the office of a Sheriff-Substitute.[1]

The Sheriff-Substitute is the resident Judge Ordinary, or judge of first instance, in his Sheriffdom, his jurisdiction and authority being co-ordinate with that of the Sheriff, to whom, however, a right of appeal against his judgments is competent. But the Sheriff-Substitute is vested with and entitled to exercise, except when from declarator or fair and necessary inference it appears otherwise, all the powers, jurisdiction, and authority pertaining to the office of Sheriff.[2] The Sheriff-Substitute, like the Sheriff, is paid out of the Consolidated Fund, and if from age or permanent infirmity he becomes incapacitated from the due exercise of his office, the fact of which must be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being as having been established to their satisfaction, he becomes, on the recommendation of the Secretary for Scotland, eligible for a pension, the amount of which varies according to the length of his tenure of office. No pension is payable unless the tenure of office has been not less than ten years. But where the period of service has been ten years and upwards, notwithstanding that such service may not have been continuous, may have been in different Sheriffdoms, and may have been partly as Sheriff-Substitute and partly as Sheriff, the Treasury may, on the recommendation of the Secretary for Scotland, pay an annuity according to a fixed scale, provided the duties of the office have been duly fulfilled. Thus, where the length of service has been not less than ten, but has not amounted to fifteen years, the pension payable is one-third of the salary; where not less than fifteen but not amounting to twenty years, two-thirds of the salary; and where not less than twenty years or upwards, three-fourths of the salary. But while the periods of actual service need not have been continuous, they must, when taken together, extend to one or other of the periods mentioned, and in computing the amount of the annuity the emoluments drawn on an average of the five preceding years are

[1] Act, s. 21.

[2] Fleming *v.* Dickson and Others, 1862, 1 M. 188, *per* Lord Ormidale.

held to constitute the annuitant's salary.[1] Where a Sheriff is removed from office before completing ten years of service, on the ground that he is by reason of inability unfit for his office, the Treasury is empowered to grant him an annuity of such amount and for such period as may be considered just in all the circumstances, in no case, however, exceeding three-tenths of the salary of which he was in receipt at the time of his removal.[2] No such provision exists with reference to Sheriffs-Substitute, who therefore on becoming unable, prior to the completion of ten years' service, owing to mental affliction or other cause, to perform the duties of their office, may be compulsorily retired without compensation of any sort.[3]

*Interim Sheriff-Substitute.*—In the event of a Sheriff-Substitute, by reason of ill-health (but apparently for no other reasonable cause), becoming temporarily unable to discharge the duties of his office, the Secretary for Scotland may, on an application being made to him by or on behalf of such Sheriff-Substitute, grant him leave of absence,[4] and appoint a person qualified to fill his office to act *ad interim* in his place and during his absence. On such *interim* appointment being made, the Treasury is, on the recommendation of the Secretary for Scotland, empowered to allow the *interim* Sheriff-Substitute such remuneration, out of monies to be provided by Parliament, as it may see fit.[5]

*Honorary Sheriffs-Substitute.*—To obviate the inconvenience caused by the temporary absence or incapacity of the Sheriff-Substitute, the Sheriff has power to appoint, by a writing under his hand, such persons as he thinks proper to hold the office of Honorary Sheriff-Substitute. The number of such Honorary Sheriff-Substitutes depends entirely on the discretion of the Sheriff, but by appointing them he renders himself responsible for their actions. No qualification whatever is required for the office, and the restrictions

[1] Act, s. 20.

[2] Act, s. 20; *re-enacting* 61 & 62 Vict. c. 8, s. 2.

[3] It is perhaps a little difficult to understand on what principle a distinction which has no justification in equity should be perpetuated. Indeed, the necessity for a similar provision in the case of Sheriffs-Substitute seems the more clamant, since, being wholly dependent on their emoluments, they are the less likely to have been able to make adequate provision for such a contingency.

[4] The Act does not expressly authorise the grant of a leave of absence, but it seems clear that by implication the Secretary for Scotland possesses that power.

[5] Act, s. 16.

and disabilities which apply to Sheriff-Substitutes do not apply to Honorary Sheriff-Substitutes, who may therefore be,[1] and not infrequently are, law agents practising in the Sheriff Court, over which they are on occasion called upon to preside. Motives of delicacy and of propriety, if no other, would of course operate to prevent an agent acting as an Honorary Sheriff-Substitute in any cause in which he possessed the slightest interest, direct or indirect. Being appointed by the Sheriff on his own initiative, they hold office solely during his pleasure; but their commissions, which entitle them to exercise all the powers and duties of Sheriff-Substitute within the Sheriffdom, subsist notwithstanding the death, resignation, or removal of the Sheriff appointing them until recalled by a succeeding Sheriff.[2] The position, though conferring some social prestige, is, as its name implies, a purely honorary one, the duties of those appointed being almost exclusively confined to purely formal and non-contentious matters, such as signing warrants and interlocutors granting adjournments or continuations. An Honorary Sheriff-Substitute is, however, entitled to attend and preside at a meeting of creditors for electing a trustee under the Bankruptcy Act, 1856, without having received notice to attend.[3] And he is entitled to have his name on the roll of Parliamentary Electors for the county: though whether he is entitled to exercise the vote is doubtful.[4] Where the absence or incapacity of the Sheriff-Substitute is likely to prove of more than temporary duration, an *interim* appointment of a qualified Sheriff-Substitute will, of course, be made.

### III. The Officials

**The Sheriff-Clerk** holds his appointment direct from the Crown on the recommendation of the Secretary for Scotland. He is appointed *ad vitam aut culpam*, and is, by statute,[5] bound to discharge the duties pertaining to his office personally, though both at common law and by virtue of the permission invariably accorded them by the terms of their commission, Sheriff-Clerks are authorised to appoint deputes, for whose actions they are responsible, to assist

[1] Henderson *v.* Warden, 1845, 17 Jur. 271.
[2] Act, s. 17.
[3] Mann *v.* Tait, 1892, 20 R. 13.
[4] Wright *v.* Kellie, 1898, 1 F. 209.
[5] 6 Geo. IV. c. 23, s. 6, not repealed by the Act of 1907.

them in the performance of their duties and to act for them during their necessary or unavoidable absence.[1] There are, accordingly, in every county deputes whose duties consist in assisting and relieving their principal; and in large and scattered counties particular deputes are specifically assigned to certain districts. The duties of the Sheriff-Clerk are multifarious, and besides keeping and preserving the records of the Court, extend to most of the matters which fall within the administration of the Sheriff, whether in his executive or judicial capacity. In judicial proceedings it is *inter alia* the duty of the Sheriff-Clerk to enrol summonses; to take charge of, lend out, receive back, and transmit to the Sheriff, the processes of causes depending in the Court; to issue the interlocutors of the Sheriff; to attend the Court while sitting, and to keep the books of Court and enter therein a record of the procedure in the processes depending; to make up the rolls of Court; to extract the decrees and orders of Court; to issue warrants for the execution of diligence, and to perform certain other important functions which will be referred to later under their appropriate headings.[2] Sheriff-Clerks and their deputes (except such as may be appointed to act only on rare occasions and are not remunerated)[3] are expressly prohibited from practising either directly or indirectly before the Courts in their Sheriffdoms,[4] and their so acting will invalidate the whole judicial proceedings in which they may have been concerned, even should the opposite party consent to waive objection.[5] But neither a Sheriff-Clerk nor his depute is precluded from acting as procurator and conducting in the Court of which he is an official an action of which he is personally the pursuer. It is, however, illegal and unwarrantable for the Sheriff-Clerk to be a party to an action in the Court of which he is clerk, in relation to which he has in any way acted in his official capacity. In such a case there can be no legal summons, and the procedure is vitiated at every step by constitutional illegality.[6] Nor will the vitiation be cured by the duties connected with the process being undertaken by a depute, since he is dependent on, and identified with, his principal. The proper and only legal course in such a case is for the Sheriff to appoint a neutral person to act as

[1] *See* Heddle *v.* Garioch, 1827, 5 S. 503.

[2] *See* Galbreath *v.* Sawers, 1840, 3 D. 52.

[3] Edie *v.* Rigg, 1879, 17 S. L. R. 36.

[4] A. S., 10th July 1839, s. 160.

[5] Smith *v.* Robertson, 1828, 5 S. 848.

[6] Smith *v.* Manson, 1871, 9 M. 492, 43 Jur. 261.

Sheriff-Clerk *pro hac vice*, to whom the custody of the process may be committed.[1] Where, however, the depute is the party concerned, the reasons which militate against the actings of his principal do not apply, at least with the same force, and it would appear to be not incompetent for the principal to act as Sheriff-Clerk in relation to proceedings in which his depute is interested as a party. Where, however, the depute stands in any near or personal relation to his principal, such as that of son or partner, considerations of propriety may be expected to point to the expediency of inviting the Sheriff to appoint a neutral person to act as Clerk to the process. Persons appointed to act as Depute Clerks in the Small Debt Circuit Courts are not thereby disqualified from acting as procurators, except in the Small Debt Court to which they are attached.[2]

A Sheriff-Clerk may be liable in damages for negligence or for any improper act, either of commission or omission, on the part of himself or his depute, which results in loss or damage to any one entitled to rely on the due and careful performance of his duties, or who can qualify an interest.[3] The Sheriff-Clerk is paid by salary, the amount of which is fixed by the Treasury, which is payable out of the fees and emoluments in civil and criminal proceedings received by him, any surplus, after satisfying his salary, being applied towards the expense attending the establishment of the Sheriff Court and the Sheriff Small Debt Circuit Courts within the county. Where, however, the fees and emoluments received are insufficient for the maintenance of a person duly qualified to execute the duties of Sheriff-Clerk, the Treasury may direct that a salary shall be payable, in addition to the fees, of such amount as may be considered necessary.[4] On the occurrence of a vacancy in the office of Sheriff-Clerk, the Court of Session, or in vacation the Lord Ordinary on the Bills, may, on the application of the Lord Advocate, appoint one or more persons to act *ad interim*.[5]

**The Auditor of Court,** who may be the Sheriff-Clerk, his depute, or a solicitor in practice, is appointed by the Sheriff, and holds office during his pleasure. He is remunerated by fees fixed and regulated according to the amount of his work. A remit is

[1] MacBeth *v.* Troy and Innes, 1873, 11 M. 404, 45 Jur. 270; Galbreath *v.* Sawers, *sup.*

[2] S. D. Act, 1837, s. 25.

[3] The cases which support this statement are, though still authoritative, of some antiquity.

[4] 1 & 2 Vict. c. 119, ss. 28, 29.

[5] Lord Advocate, *Pet.*, 1880, 8 R. 13.

usually made to a neutral person to tax any account in which the Auditor is personally interested.

## IV. The Law Agents

**Qualifications.**—By the Law Agents Act, 1873,[1] a uniform standard of qualification was established for law agents throughout the country, the exclusive privileges formerly possessed by the members of certain societies of practising before particular Courts being abolished. Under the provisions of that Act the term Law Agent includes Writer to the Signet, Solicitor in the Supreme Courts, Procurator in any Sheriff Court, and every person entitled to practise as a Law Agent in any Court of Law in Scotland; and since the passing of the Act no one is admitted as a Law Agent in Scotland except in accordance with its provisions. The Act provides for the establishment of a register of Law Agents, which is kept at the Register House by one of the Assistant Clerks of Session, an enrolled Law Agent being entitled to obtain a certificate of his enrolment on the register on payment of a fee of two shillings and sixpence. Rolls are also kept of Agents practising in the Court of Session and of those practising in the Sheriff Courts, and no one is entitled to practise before either of these Courts unless he has subscribed the appropriate roll of Agents. The name of any Agent may be struck off the rolls, upon application duly made, and after hearing parties or giving them an opportunity of being heard,[2] or upon the Agent's own written application, made either to the Lord President or the actual Keeper of the Rolls.[3] An enrolled Law Agent who has paid the stamp duty chargeable on admission to practise in the Sheriff Court, is qualified to sign the roll of Agents practising in the Court of Session on paying the difference between the duty he has paid and the higher duty exigible in that case. Subject to these provisions, every enrolled Law Agent is entitled to practise in any Court of Law in Scotland.

**Admission.**—To enable a candidate to qualify for admission as a Law Agent, certain conditions, some statutory and others prescribed by the various Acts of Sederunt passed to carry the statutory pro-

[1] 36 & 37 Vict. c. 63.

[2] *See* Innes *v.* M'Donald, 1899, 2 F. 6, and *infra*.

[3] Inc. Socy. of Law Agents *v.* Purves, 1897, 24 R. 394.

visions into effect,[1] must be duly complied with. Among the statutory provisions are: (1) An applicant for admission must be twenty-one years of age, and must, except in the cases after-mentioned, have served an apprenticeship of five years with a practising Law Agent, or with a Sheriff-Clerk in practice at the passing of the Act. (2) The apprenticeship must be served under indenture, which must be recorded in a separate book kept by the Registrar of Law Agents for the entry of indentures and assignations thereof intimated to him,[2] and the intimation must be made to the Registrar within six months from the date fixed for the commencement of the apprenticeship. Any assignation of the indenture must be intimated to the Registrar within six months of its date. (3) When from necessary or reasonable cause the whole period of apprenticeship cannot be completed with the master named in the indenture, the remainder of the period may be served with another qualified master. (4) A master may permit his apprentice to serve any part of his term, not exceeding two years, with another qualified master. (5) For any of the following persons an apprenticeship of three years is sufficient, namely: (*a*) One who has been five years a clerk to, and engaged under the superintendence of, a practising Law Agent in such business as is usually transacted by Law Agents; (*b*) one holding a degree in Law or Arts of any University in Great Britain or Ireland, granted after examination; (*c*) a member of the Faculty of Advocates; (*d*) one called to the degree of Utter Barrister in England; (*e*) one admitted and enrolled as an Attorney or Solicitor in England; (*f*) a candidate for admission must make an affidavit that he has actually served an apprenticeship to a qualified master or masters during the whole time statutorily required. The mode of admission is by petition to the Court of Session, praying for admission as a Law Agent, which may be presented to any judge officiating as a Lord Ordinary, including the Lord Ordinary on the Bills in vacation. The judge thereupon remits the applicant to examiners appointed by the Court. In order to qualify for final admission as a Law Agent, applicants must have passed three examinations, two in general knowledge and one in law, and no candidate can be examined in law until he has passed the two former. The first examination in

[1] A. S., 20th Dec. 1873, 28th Jan. 1874, 4th Nov. 1886, 18th March 1893, 12th July 1893, 29th Jan. 1895, 11th July 1899, and 26th May 1906.

[2] A. S., 26th May 1906, s. 2.

general knowledge must be passed before the commencement of apprenticeship, and no person can be admitted as an apprentice under indenture to a Law Agent until he has passed this examination.[1] The leaving certificate, either of the higher or lower grade of the Scots Education Department, or the certificate, higher or lower, issued by the Oxford and Cambridge Schools Examination Board, exempt the candidate from examination in any subject to which these certificates apply. The second examination in general knowledge may be passed at any time after the candidate has passed the first, and a candidate who fails to pass in either may offer himself for re-examination at any time, being required to qualify only in such subjects as he has failed to pass, or their equivalent subjects. The higher grade leaving certificate of the Scots Education Department, or the higher certificate of the Oxford and Cambridge Schools Examination Board, exempt the candidate from examination in any subject to which these certificates apply. The higher standard certificate granted to students who have passed the preliminary examination in the specified subjects of the curriculum for the M.A. degree, under the ordinance No. 11 of the Universities Commissioners, exempts candidates from both examinations in general knowledge, but they are required to pass an examination in book-keeping. Candidates holding a degree of any University within the United Kingdom granted after examination are exempt from any examination in general knowledge, including book-keeping. Further, it is not necessary for a candidate to undergo either examination, provided—(1) he has been admitted as an apprentice under indenture to a Law Agent, and has passed the entrance examination under the regulation in force prior to 18th March 1893; (2) he has attended at a University in three separate sessions three separate classes in Arts (of which Humanity is one), and taken part in the examinations of such classes; (3) he has completed his attendance at such classes prior to 1st November 1895. Candidates holding certificates entitling to exemption from the first examination must present them to the examiners before commencing their apprenticeship. Similarly, those possessing certificates exempting from the second examination must present them to the examiners before entering for the examination in Law. In each case the date of presentation is marked upon the certificate, and the examiners certify that such presentation has

[1] A. S., 11th July 1899, s. 1.

been made and that the candidate is exempt from the examination to which the certificate applies. The examination in Law can be taken only after the candidate has passed both examinations in general knowledge, and after the petition for admission as a Law Agent has been presented to the Court. The petition for admission is prepared by the Clerk to the Examiners, and to enable him to prepare it candidates must give intimation twenty-eight days before the date of the examination, and lodge with him the extract of indenture duly discharged, or an assignation thereof or second indenture duly discharged, if such was entered into, and a certificate of birth. The subjects of examination include Scots Law, civil and criminal; Conveyancing and Forms of Process, civil and criminal. Candidates holding a degree in Law of any Scots University are required to undergo only an examination in Forms of Process, civil and criminal.

**Signing Roll and Certificate.**—To entitle a Law Agent to practise before any particular Sheriff Court, he must first have subscribed the Roll of Agents entitled to practise before that Court, and he remains entitled to practise before that Court only so long as and while his name continues on the roll. In the event of his name having been struck off for any reason, it must be restored before he is enabled to resume practice.[1] Besides signing the roll, an Agent must take out a yearly certificate under the Stamp Acts. The penalty for directly or indirectly practising in any Court without first having obtained a certificate, or for not truly specifying the facts in applying for it, is £50.[2] The result of failure to take out the certificate, over and above the penalty attached, is to render the person so failing incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity.[2] And any person who, without having first obtained a certificate, either directly or indirectly, for and in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity, renders himself liable, over and above other penalties, to a fine of £50.[2] The certificate should be taken out between the 31st of October and the 1st of December each year, and in any case, whether taken out

[1] Law Agents Act, 1873, s 16.
[2] 54 & 55 Vict. c. 39, ss. 43, 47, 48. Innes *v.* M'Donald, 1899, 2 F. 6; 37 S.L.R. 7.

then or at any other time, expires on the 31st of October following. The stamp on the certificate, in the case of an Agent carrying on business within the city or shire of Edinburgh, is, if he has been three or more years in business, £9, and if less than three years £4, 10s.; and in the case of an agent carrying on business elsewhere, £6 and £3 respectively.[1]

**Censure and Deprivation.**—Every enrolled Law Agent is subject to the jurisdiction of the Court of Session in any complaint which may be made against him for misconduct as a Law Agent, and the Court, in either Division, may, after hearing parties or giving them an opportunity of being heard, deal summarily with any such complaint, and dispense such justice as may seem to it fit.[2] The mode by which the conduct of a Law Agent is brought under the notice of the Court is by petition, which is usually presented at the instance of the Society to which the offender belongs, but which is competent at the instance of any person who can qualify an interest.[3] It is, however, doubtful whether a member of the public may competently petition for the removal of a qualified law agent's name from the roll, on the ground that, having employed him professionally, he had abused the confidence reposed in him. In any event, even if competent, such a petition should *primo loco* be intimated to the Society of which the Agent is a member.[4] The fact that a Law Agent has been formally expelled from a Society of which he is member, gives the Society a sufficient title to apply for removal of his name from the roll.[5] The petition should of course specify the grounds on which the removal of the Agent's name from the roll is desired, and when the application is made on the ground that the Agent has been guilty of conduct inferring crime, it must be supported and established by proof if the accused has neither been convicted nor fugitated.[6] The Court in its interlocutor must specify the particular charge or charges which it finds proved.[7] These provisions do not, however, in any way interfere with or affect the powers ordinarily possessed by the Sheriff over Agents in

[1] *Ibid.*

[2] Law Agents Act, 1873, ss. 14, 22.

[3] Socy. of Solrs. of Elgin *v.* Shepherd, 1881, 18 S.L.R. 303; Socy. of Law Agents *v.* Clark, 14 R. 161; Socy. of S.S.C. *v.* Clark, 13 R. 1170; Pearson *v.* Jack, 2 S. 581,

[4] A. B. *v.* C. D., 1899, 2 F. 67.

[5] Faculty of Procrs. in Glasgow *v.* Colquhoun, 1900, 2 F. 1192.

[6] Aberdeen Socy. of Solrs. *v.* Sim, 1897, 24 R. 511.

[7] Pearson *v.* Jack, *sup.*

practice before him and necessary for supporting his jurisdiction and maintaining the authority of his Court.[1]

**Punishment of Disqualified Persons.**—Any person who is neither a Law Agent nor a Notary Public, and who, either by himself or in conjunction with others, wilfully and falsely pretends to be, or takes or uses a title or description which implies that he is, duly qualified to act either as a Law Agent or a Notary Public, or that he is recognised by law to be so qualified, is guilty of an offence, for which on conviction he is liable to a penalty of £10, together with the costs of his prosecution and conviction. For any subsequent similar offence he is liable on conviction to a penalty of £20, or alternatively to one month's imprisonment, in addition to the costs of his prosecution and conviction.[2] The offence may be prosecuted before the Sheriff, either of the county in which the offender resides or in which the offence is committed, by the Procurator-Fiscal, by any Incorporated Society of Law Agents, or by any individual Law Agent or Notary Public, in the manner provided by the Summary Jurisdiction Acts of 1864 and 1881.[3] Any person who acts as a Law Agent or Notary Public, or who gives legal advice or frames or draws any deed, without being duly qualified to do so, besides being liable to conviction for his offence, forfeits his right to recover any fee for, or the costs or disbursements incidental to, any act or proceeding so undertaken or done by him.[4] No person can be duly qualified unless he possesses the certificate entitling him to practise already referred to.[5]

**Notaries Public.**—Since 1896 it has been competent at any time for a Notary Public to present a petition to the Court of Session praying for his admission as a Law Agent under the Act of 1873, and the Acts explaining and amending that Statute. On presentation of the petition, in which the applicant should state his knowledge of the forms of process, and lay before the Court evidence of his qualifications, the Court orders intimation to the W.S. and S.S.C. Societies in the case of a practitioner resident or practising in Edinburgh, and in the case of any other, to the Incorporated Law Society, answers, if advised, to be lodged within a specified time.[6] On resuming

[1] Law Agents Act, 1873, s. 26.
[2] Law Agents and Notaries Act, 1891, s. 2.
[3] *Ibid.* s. 4.
[4] *Ibid.* s. 3.
[5] Innes *v.* M'Donald, 1899, 2 F. 6.
[6] *See* A. B. and Others, 1896, 34 S.L.R. 232 (O.H.).

consideration of the petition and answers, if satisfied, the Court dispenses with the ordinary rules as to examinations, indenture, and service, and remits the petitioner to the examiners for examination in the forms of process. On production of a certificate by the examiners that he has passed that examination, and without making the affidavit of apprenticeship required under the Act of 1873, the Court may admit the candidate as a Law Agent and cause his name to be enrolled as such. The Court may, however, in its discretion, dispense with the examination in the case of a Notary Public who has regularly taken out the licence certificate required by law, and has been in practice as a Notary Public for not less than seven years immediately preceeding.[1] Notaries Public, although not enrolled Law Agents, may now be admitted as members of the Incorporated Society of Law Agents.[1] If not duly qualified as Law Agents they are not entitled to recover charges for Court business, though they are entitled to recover fees for other classes of business they may be entrusted with,[2] and even for conveyancing business which is not prohibited by the Stamp Act already referred to.[3]

**Agents entitled to Costs out of Client's Property.**—Law Agents are now, in every case in which they may be employed to sue or defend an action in Court, and in the discretion of the Court or Judge before whom the cause depends,[4] entitled to a charge upon and against, and a right to repayment out of, any property, of whatsoever nature, tenure, or kind, which in such action they may have recovered or preserved on behalf of their clients, for their expenses connected with such action, as the same may be taxed. In such cases the Court or Judge may make such order or orders as may seem just for the taxation of, and for the raising and payment of, such expenses out of the property recovered. Any act done or deed granted by the client after the Court or Judge has declared the agent entitled to such charge, except acts or deeds in favour of a *bona fide* purchaser, are void.[5]

**Borrowing Process.**—While litigants are, of course, entitled in the Sheriff Court to appear in person and plead in any cause to which they may be parties, and to sign and lodge any papers relative

[1] Law Agents (Scot.) Amend. Act, 1896, ss. 3, 4.

[2] Winton *v.* Airth, 1868, 6 M. 1098.

[3] Aitken *v.* Kirk, 1876, 3 R. 595.

[4] *See* Carruthers *v.* Carruthers, 1897, 24 R. 363.

[5] Law Agents and Notaries Act, 1891, s. 6; *see infra*, Expenses.

to such cause, the privilege of borrowing processes is confined exclusively to such agents as are qualified and entitled to practise in the jurisdiction of the Court, or their duly authorised clerks, for whom they are responsible.[1]

**Mandate.**—An agent is presumed to have a mandate from his client authorising him to act for him, though he may be ordered to produce it if the opposite party denies or disputes its possession.[2] But where the authority of the Agent, either to raise or to defend an action, is disputed, time will generally be given to permit of its production. Thus in one case the Court allowed the Agent eight days in which to produce his mandate, and on the expiry of that time, no sufficient mandate having been produced, dismissed the action.[3] A mandate may be either special, having reference to the particular suit, or general, involving authority to the mandant to represent the cedent is all legal proceedings in which he may be interested, and it may be written or verbal. But while, in a question with his client, the employment of an Agent is a question of fact which may be proved by parole, a written mandate is necessary in a question with the opposite party. Thus it is competent to prove by parole the terms of an agreement in terms of which an Agent agrees to act for his client for a modified or unusual fee,[4] or without fees except in the event of success,[5] though the general rule of law is that where a person has authorised an Agent to act for him he is liable for ordinary professional or business charges, although he may have given no express mandate. Where the employment is admitted, the condition that it should be gratuitous can only be proved by the writ or oath of the Agent employed.[6] A special mandate authorises the Agent to act only within the limitations imposed on him. Thus a mandate to conduct a suit in the Sheriff Court does not authorise its conduct in the Court of Session.[7] On the other hand, a general mandate, either express or implied, authorises the Agent to perform all usual or necessary acts con-

[1] Act, Sch. 1, s. 16.

[2] Taafe *v.* Taafe, 1822, 1 S. 319; Bonny *v.* Gillies, 1829, 8 S. 13; Hepburn *v.* Tait, 1874, 1 R. 875.

[3] Fischer *v.* Anderson, 1896, 23 R. 395; Ferguson Davidson, & Co. *v.* Patterson, Dobbie, and Others, 1898, 1 F. 227.

[4] Jacobs *v.* M'Millan, 1899, 2 F. 79; Scotland *v.* Henry, 1865, 3 M. 1125.

[5] Knox *v.* M'Caul, 1861, 24 D. 16; Swanson *v.* Robertson, 1833, 11 S. 718.

[6] Taylor *v.* Forbes, 1853, 24 D. 19; Moscrip *v.* O'Hara, 1880, 8 R. 36; Scotland *v.* Henry, 1865, 3 M. at 1129.

[7] Taafe *v.* Taafe, 1822, 1 S. 319.

nected with the subject to which it refers.[1] But it does not confer authority to abandon,[2] compromise, or refer a cause,[3] nor to appeal it.[4] A mandate, either special or general, may be inferred from circumstances, as by possession of the service copy of the petition,[5] though no positive act sanctioning the employment is necessary. But to entitle an Agent to recover his expenses from a client on whose behalf he acts, he must be able to show not only that his client either expressly or impliedly authorised his employment, but that he did so either actually or in circumstances from which it can clearly be inferred, on the footing that he was personally to be liable for any expenses that might be incurred. Thus members of a committee are not individually liable for expenses, unless the Agent can prove that his employment was sanctioned by them individually.[6] Nor is an Agent entitled to his expenses from the person in whose name he conducts a suit and who supplies him with information necessary for its conduct, if he is aware that the liability rests on others who possess the real interest in its success.[7] An Agent employed on behalf of several parties is entitled to look for his expenses to the various parties only in respect of the proceedings in which each has an interest,[8] though, of course, where all have the same interest, the liability is joint and several.[9] An Agent who acts without a mandate or authority from his client renders himself personally liable for any expenses that may be decerned against the party for whom he so acts.[10] The general rule as to mandate is that the Agent must follow the instructions of his client, subject to the qualification that he cannot be asked to follow them beyond what is lawful and proper. He owes a duty to the Court, and must confine himself to the rules and practice of the Court in his conduct of every suit. He is also bound by that

[1] Macintosh *v.* Macintosh, 1863, 2 M. 48 ; Clarke *v.* M'Nab, 1888, 15 R. 569.

[2] Urquhart *v.* Grigor, 1857, 19 D. 855, *per* Ld. J.-C. Hope.

[3] Livingstone *v.* Johnstone, 1830, 8 S. 594 ; Black *v.* Laidlaw, 1844, 6 D. 1254.

[4] Stephen *v.* Skinner, 1863, 2 M. at 290, *per* Ld. Colonsay.

[5] Young *v.* M'Gill, 1823, 2 S. 303 ; Grant *v.* Wishart, 1845, 7 D. 274 ; Muir *v.* Stevenson, 1850, 12 D. 512 ; Dickie *v.* Brash, 1838, 16 S. 353.

[6] Campbell *v.* Lauder's Reps., 1852, 15 D. 117 ; M'Ewan *v.* Campbell, 1853, 16 D. 117, *affd.* 1857, 2 Macq. 499.

[7] Scott *v.* Donaldson, 1831, 10 S. 107.

[8] Campbell *v.* M'Culloch, 1821, 1 S. 36 ; MacBrair *v.* Small, 1871, 8 S.L.R. 301.

[9] Smith *v.* Harding, 1887, 5 R. 147.

[10] Cowan *v.* Farnie, 1836, 14 S. 634 ; *see* Livingstone *v.* Johnson, 8 S. 594 ; Robertson *v.* Ross, 1873, 11 M. 910.

unwritten law of his profession which embodies the honourable understanding of the members as to their bearing and conduct towards each other.[1]

**Agreements to share Fees.**—Agreements between Law Agents acting for the same client to share fees or profits are legal; and a Law Agent acting for a client whom he discloses incurs no liability to any other Law Agent employed by him, except such as he expressly undertakes in writing.[2] But a country Agent is not entitled to employ a town Agent without the authority, express or implied, of his client; and if he does so, he does not thereby render his client liable for the town Agent's charges.[3] On the other hand, where the employment of a town Agent is sanctioned by the client, either actually or in circumstances from which his knowledge or acquiescence can be presumed, the client thereby renders himself liable for the business charges of the town Agent, even where the country Agent has been supplied or entrusted with funds for the purpose of paying the town Agents, which he has embezzled or failed to forward.[4]

**Women** are, under the existing statutes, ineligible to become, or to practise as, Law Agents in Scotland.[5]

## V. The Officers of Court

**Sheriff Officers,** who are the officials by whom writs are usually served and executions carried out in the Sheriff Court, are appointed by the Sheriff, on petition, and continue to act during their good conduct, though they may be dismissed or suspended by the Sheriff for malversation. Their qualifications for the office are determined by a preliminary examination, usually conducted by the Sheriff, but sometimes by one or more of the Law Agents practising before the Court, to whom they are remitted for examination. They must find caution to the satisfaction of the Sheriff for the due performance of their duties, and on admission take the oath *de fideli.* On the death or resignation of a cautioner his place must be instantly supplied, though, to obviate the inconvenience caused by the

[1] Batchelor *v.* Mackersy and Pattison, 1876, 3 R. 914, *per* Ld. Pres. Inglis.

[2] Law Agents Act, 1873, s. 21.

[3] M'Laren *v.* M'Dougall, 1881, 8 R. 626, *per* Ld. Young.

[4] Clark and Macdonald *v.* Schulze, 1902, 4 F. 448.

[5] Hall *v.* Inc. Socy. of L. A., 1901, 3 F. 1059.

death or resignation of a private cautioner, it is usual to obtain the services of one of the various guarantee societies. A Sheriff Officer is not entitled to exercise his discretion, or in any way to deviate from the strict terms of the warrant which it is his duty to enforce. A warrant of citation or a warrant or precept of arrestment proceeding upon a depending action or a liquid document of debt, may in any competent manner be now lawfully executed within the jurisdiction of any Sheriff without the indorsation of the Sheriff-Clerk of that jurisdiction, and if executed by a Sheriff Officer may be so executed either by an officer of the Court which granted the warrant or precept, or by an officer of the jurisdiction within which it is to be executed.[1] Warrants of citation, though still competently and in some cases properly made by a Sheriff Officer personally, are however now commonly effected under the provisions of the Citation Amendment Act of 1882, and incorporated in the Act, by registered letter through the Post Office.

[1] Act, Sch. 1, s. 10.

# SECTION II

## THE JURISDICTION OF THE SHERIFF COURT

## CHAPTER II

### 1. JURISDICTION WITH REGARD TO PERSONS

#### 1. Persons Subject to the Jurisdiction


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#### 2. Persons Exempt from the Jurisdiction


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**1. Forum conveniens.**—The use of the terms *forum conveniens* and *forum competens* have hitherto been confined exclusively to the procedure of the Court of Session. The plea of *forum non conveniens*, which is equivalent to one of *non competens*, arises where jurisdiction exists both in the Court of Session and in the Court of another country, and the action is one which ought properly to be tried in the Courts of such foreign country and not in the Court of Session. But under the provisions of the Act of 1907 the use of the terms seems now permissible in the Sheriff Court. Questions as to the jurisdiction of the Sheriff Court over persons arise with

reference only to defenders, since any person *sui juris*, whether he be a Scotsman or a foreigner, may competently be the pursuer of an action. A defender must be sued in the Court of the particular Sheriff to whose jurisdiction he is amenable, that is, he must be sued in the *forum competens*. But a defender may be subject to the jurisdiction of more than one Court. Thus he may reside in one county and carry on business in another, and he may, therefore, in the pursuer's option, and provided the action is otherwise competent, be sued in the Sheriff Court of either jurisdiction. In the case of a multiplepoinding he may be convened either to the jurisdiction to which the holder of the fund *in medio* is subject, or to that where the fund itself is actually situated. In each case the Court is a *forum competens*. But the *forum competens* is not necessarily the *forum conveniens*, and the Sheriff has power to refuse, either absolutely or *pro tempore*, to entertain an action if satisfied that the question at issue might more conveniently be disposed of in another Court to whose jurisdiction the defender is amenable.[1] Thus, provided jurisdiction otherwise exists, it is in the pursuer's option to choose the *forum* in which he desires to sue the defender, but if the *forum* he selects be *non conveniens*, his case may be rejected or remitted to one which is.[2] Thus, where in a Sheriffdom, owing to the union of counties, there is more than one Court, it is in the discretion of the Sheriff in which Court of the Sheriffdom the defender shall be called.[3] The Act provides, in terms which are as extensive as they are clear, (1) that where there are two or more defenders and the cause is brought in the Sheriffdom in which one of them is domiciled, the Sheriff, if he thinks it expedient, may transfer the cause to any other Court which has jurisdiction over any of the defenders;[4] and (2), that the Sheriff may, upon sufficient cause by interlocutor stating his reasons, remit *any* cause to another Sheriffdom, such interlocutor when issued by a Sheriff-Substitute being by his leave appealable within seven days to the Sheriff, but no further.[5] Again, where formerly a plea of no jurisdiction was sustained in one Sheriff Court in respect that the action could only competently be raised in the

[1] *See* Powell *v.* Mackenzie, 1900, 8 S.L.T. 152 (O.H.); Davidson *v.* Davidson, 1891, 18 R. 884.

[2] Sim *v.* Robinow, 1892, 19 R. 665.

[3] Tait *v.* Johnston, 1891, 18 R. 606.

[4] Act, Rule 19.

[5] Act, Rule 20.

Court of another Sheriffdom, the action necessarily fell to be dismissed. Under the Act of 1907, however, provision is made, in order to obviate the want of jurisdiction being necessarily fatal, that when a plea of no jurisdiction is sustained, the Sheriff may, if he think proper, remit the cause to the Sheriff before whom he thinks the action should have been brought, such interlocutor, if pronounced by a Sheriff-Substitute, being appealable to the Sheriff, by leave, within seven days.[1] Under the provisions of the Act, therefore, the plea of no jurisdiction may become tantamount to one of *forum non conveniens*.

**2. Constitution of Jurisdiction.**—In order that an action may be competent in the Sheriff Court, it is essential, in the first place, that the person or persons against whom a decree is sought or who are called as defenders to the action, shall be amenable to the jurisdiction of the Sheriff. In any action which is brought before the Court, the question whether or not the defender is subject to the jurisdiction must be disposed of *ante omnia*.[2] Any action competent in the Sheriff Court may, under the provisions of the Act, be brought within the jurisdiction of the Sheriff:—

1. Where the defender (or when there are several defenders, where one of them) resides within the jurisdiction, or, having resided there for at least forty days immediately prior to the raising of the action, has ceased to reside there for less than forty days, and whose present residence in Scotland is unknown[3] (*ratione domicilii*).

2. Where the defender carries on business, and has a place of business within the Sheriffdom, and is cited either personally or at such place of business.[4]

3. Where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner, part-owner, or master, or goods, debts, money, or other moveable property belonging to him have been arrested within the jurisdiction[5] (arrestment *ad fundandum jurisdictionem*).

4. Where the defender is owner, part-owner, tenant, or joint-tenant, whether individually or as a trustee, of heritable property within the jurisdiction, and the action relates to such property or to his interest therein[6] (*ratione rei sitæ*).

[1] Act, Rule 21.
[2] M'Leod *v.* Tancred, Arrol, & Co., 1890, 17 R. 514.
[3] Act, s. 6 (*a*).
[4] Act, s. 6 (*b*).
[5] Act, s. 6 (*c*).
[6] Act, s. 6 (*d*).

5. Where the action is for interdict against an alleged wrong being committed or threatened to be committed within the jurisdiction.[1]

6. Where the action relates to a contract, the place of execution or performance of which is within the jurisdiction, and the defender is personally cited there;[2] (*ratione contractus*).

7. Where in an action of forthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction; or the arrestee or holder of the fund is subject to the jurisdiction of the Court.[3]

8. Where the party sued is the pursuer in any action pending within the jurisdiction against the party suing[4] (*ex reconventione*).

9. Where the action arises out of the delict of the defender within the jurisdiction, and he is personally cited there[5] (*ex delicto*).

10. Where the defender prorogates the jurisdiction of the Court.[6]

**3. Residence.**—Jurisdiction against a defender is constituted at common law by his actual residence within the jurisdiction, *animo remanendi*. So long as the residence is constituted by the intention of permanent domicile it is immaterial how long it may have actually continued. Jurisdiction, therefore, begins with the fact of residence, provided it have been begun *animo remanendi*, and once it has been established it continues until the person either acquires a new domicile in another county or leaves the kingdom. If a person acquires a residence in a county *animo remanendi*, it is immaterial that he personally resides there only for a day or two at a time.[7] And such residence is not necessarily limited to one jurisdiction, since if a person has at the same time a permanent town residence and a permanent country one, he is subject to the jurisdiction in which each is situated,[8] though he should, in such a case, be cited in the jurisdiction within which he is at the time actually resident.[9] Where two or more counties are united into one Sheriffdom, a defender is bound to answer a citation in the principal Court of the united counties, although he may be actually resident in

[1] Act, s. 6 (*e*).
[2] Act, s. 6 (*f*).
[3] Act, s. 6 (*g*).
[4] Act, s. 6 (*h*).
[5] Act, s. 6 (*i*).
[6] Act, s. 6 (*j*).
[7] Home *v.* Eccles, 1725, M. 3704; Irvine *v.* Deuchar, 1707, M. 3703.
[8] Spottiswoode *v.* Morison, 1701, M. 4790.
[9] Gordon *v.* Campbell, 1702, M. 3702.

another.[1] But that rule does not apply to the District Courts in the same county. Thus, where a person resident in Aberdeen desired to cite a person who resided in the Peterhead district of the county, the Sheriff-Clerk's refusal to grant the warrant of citation was upheld, on the ground that, where under statutory regulations actions in one district of a county are directed to be brought in the Court appropriate to that district, it is incompetent to convene the defender to any other Court in the Sheriffdom.[2] As jurisdiction can only be exercised where it is statutorily conferred, it is *pars judicis* to object to entertain an action which is not subject to the jurisdiction of the Court. Where, therefore, a Sheriff becomes aware that a case brought before him ought to have been raised before the Sheriff exercising jurisdiction over another district of the same county, he ought, as he is empowered by the Act, to at once transfer the cause to that jurisdiction. In any case he must do so if the defender craves the transfer.

*Residence for forty days.*—But the Sheriff has also by Statute jurisdiction over all persons who have resided within the Sheriffdom for at least forty days prior to the raising of the action in which they are called as defenders, and who, having resided there during that period, have not since been absent for forty days, and whose present residence in Scotland is unknown. The jurisdiction, in the case of Scotsmen, subsists for forty days after they have quitted residence in one county, until they are known to have acquired a residence in another Sheriffdom, in which case they become subject to the jurisdiction of the Sheriff in whose county they reside—(*a*) at once, if the residence be acquired *animo remanendi*, or (*b*) after forty days in any case. In the case of foreigners the jurisdiction subsists for forty days while they remain in Scotland; but the moment a foreigner leaves Scotland the domicile constituted by his forty days' residence in Scotland comes to an end, he ceases entirely to be subject to the jurisdiction of the Scots Courts, and no citation afterwards left for him at the place where the forty days' residence was spent will be sustained.[3] Thus personal service in England on a domiciled

[1] Tait *v.* Johnston, 1891, 18 R. 606; Kelso District Committee *v.* Fairbairn, 1891, 29 S.L.R. 284.

[2] Davidson *v.* Davidson, 1891, 18 R. 884.

[3] Shand's Pract. 238–239, *approved in* Corstorphine *v.* Kasten, 1898, 1 F. 287 (*over-ruling* Internat. Exhib. *v.* Lee Babty, 1891, 18 R. 843, *per* Ld. Stormonth Darling); Buchan *v.* Grimaldi, 1905, 7 F. 917.

Englishman who had previously resided in Scotland, and who had not, prior to citation, been absent for forty days, was held not to confer jurisdiction over him in the Scots Courts.[1] At the same time, a foreigner against whom jurisdiction has been founded by arrestment, will be barred from objecting to the citation, in answer to which he has entered appearance, on the ground that, being now furth of Scotland, he is not amenable to the jurisdiction of the Scots Courts by reason of his previous residence for forty days in Scotland.[1] It is not necessary that the residence should have been begun and have been continued with any idea of permanence, actual residence in a hotel, a lodging-house, or as a guest in a friend's house for forty days being sufficient. Nor is it necessary that the forty days should have been continuous, provided the interruptions have not been sufficient to destroy the character of residence.[2] The residence may even have been taken up for the express purpose of founding jurisdiction.[3] A person originally of Scottish domicile who has lost his domicile of origin, is, for purposes of jurisdiction, a foreigner, and a residence in Scotland for less than forty days will not *per se* found jurisdiction against him, even if he have been personally cited within the jurisdiction.[4]

*Persons of no fixed residence* are amenable at common law to the jurisdiction in which they happen to be found, if personally cited there. Thus sailors and soldiers, when on shore or off duty, are subject to the jurisdiction of the Court of the Sheriffdom in which is situated the house they occupy, whether their own or a relative's, whatever be the length of their period of residence.[5] Similarly, members of the itinerant class travelling the country as agents, dealers, or merchants, are, if personally cited, subject to the jurisdiction of any Sheriffdom in which they happen at the time to be.[6]

*Wives and Minors* are, generally speaking, subject to the jurisdiction in which their husbands' or fathers' residences are respectively situated. In regard to questions of *status* or divorce, which are competent only in the Supreme Court, it has been decided that the mere residence of the husband for forty days in Scotland does not

[1] Watt *v.* Watt, 1902, 9 S.L.T. 400 (O.H.); Colley *v.* Cameron, 1902, 9 S.L.T. 391 (O.H.).

[2] Ritchie *v.* Fraser, 1852, 15 D. 205.

[3] Joel *v.* Gill, 1859, 21 D. 929.

[4] Tasker *v.* Grieve, 1905, 8 F. 46.

[5] Brown *v.* M'Allan, 1845, 7 D. 423.

[6] M'Niven *v.* M'Kinnon, 1834, 12 S. 453; Linn *v.* Casadinos, 1881, 8 R. 849.

confer jurisdiction against the wife.[1] It may be doubted whether the mere residence of a husband for forty days in any particular county would subject the wife to the jurisdiction of the Sheriff Court of that county, unless she happened to share her husband's residence. A minor, especially if nearly of age, who maintains himself is properly sued at the place where he usually resides. But where a student, aged eighteen, in attendance at Glasgow University, resided in lodgings taken for him by his father, who maintained him, it was held that he had not lost his domicile of citation at his father's house in Renfrewshire.[2]

*More Defenders than one.*—At common law, the Sheriff Court has, except in certain instances to be noted, no jurisdiction in actions where the defenders, if more than one, are not each individually subject to the jurisdiction. Thus at common law an action against several defenders, each resident in different jurisdictions, can be competently raised only in the Court of Session. But an exception to the rule exists in the case of trustees or executors of a deceased person, who are subject to the jurisdiction of the Sheriffdom where the deceased resided and his property is situated, or to that where he lived and his estate is wound up and confirmation granted,[3] though some or all of them are not personally subject to the jurisdiction.[4] The Act, however, provides substantial relief to the pursuer of an action which he desires to raise in the Sheriff Court, but which, owing to the fact that there happened to be more than one defender, was formerly competent only in the Supreme Court, by providing that if one of the defenders is resident in the Sheriffdom the action may competently be raised there. The defender must, however, it is clear, be amenable to the jurisdiction in respect of actually having his residence within it, and not merely because he happens to carry on business within the Sheriffdom. Any hardship which is likely to accrue to a defender who is convened to a Court which has no personal jurisdiction over him, is met by the provision that, where an action in which there are two or more defenders is brought in the Court of the domicile of one of them, it is in the power of the Sheriff to transfer the cause to any other Court which has

[1] Ringer *v.* Churchill, 1840, 2 D. 307.
[2] Steel *v.* Lindsay, 1881, 9 R. 160.
[3] Black *v.* Duncan, 1827, 6 S. 261; Halliday's Exr. *v.* Halliday's Exrs., 1886, 14 R. 251; Thompson *v.* Wilson's Trs., 1895, 22 R. 866.
[4] *See* M'Gennis *v.* Rooney, 1891, 18 R. 817.

jurisdiction over any of the defenders, if such a course is, in his opinion, expedient, the action so transferred thereafter proceeding in all respects as if it had been originally brought in the Court to which it is transferred.[1]

**4. Carrying on Business in Sheriffdom.**—At common law, the fact that an individual carries on business within the Sheriffdom does not, in general, *per se* suffice to subject him to the jurisdiction. But in one case relative to the delivery of certain title-deeds, a Law Agent was held to be amenable to the jurisdiction within which his office was situated, where the title-deeds were deposited, and where he was personally cited, though he himself was domiciled in another Sheriffdom,[2] though the *ratio* of the decision seems rather to have been that the defender was amenable to the jurisdiction within which the title-deeds lay *ratione contractus*,[3] than that he was so amenable because his business premises were also situated within the jurisdiction. In the case of companies and partnerships, even though they be fictitious and consist of only one person, the Sheriff Court of the county within which the company carries on business possesses jurisdiction at common law, both as regards the company and its individual partners during the subsistence of the partnership,[4] wherever they may personally reside, in actions relating to or arising out of the business,[5] a jurisdiction of which it can be deprived only by express enactment.[6] Thus a statutory enactment that a railway company must be cited at its head office does not take away the common law jurisdiction of any Court in the territory of which it possesses stations and carries on business,[7] though the requirements as to citation must be duly complied with. A partnership or a company is subject to the jurisdiction in each county in which it carries on business, whether its head office be situated within such county or not. It is, of course, subject for all purposes to the jurisdiction in which its head office is situated. But it is, at common law, subject to the jurisdiction of a Sheriffdom in which a subsidiary

[1] Act, Rule 19.

[2] Ritchie *v.* Wilson, 1828, 6 S. 552; *see* Hunter *v.* Fairweather, 1837, 15 S. 693.

[3] So cited by M'Glashan, 4th ed., p. 71.

[4] M'Eachern *v.* M'Pherson, 1824, 3 S. 211.

[5] Bishop *v.* Mersey & Clyde Navig. Steam Co., 1830, 8 S. 558; Young *v.* Livingstone, 1860, 22 D. 983; Harris *v.* Gillespie, 1875, 2 R. 1003.

[6] *See* Mitchell *v.* J. & W. Stewart, 1907, 14 S.L.T. 685, 856.

[7] Aberdeen Rly. Co. *v.* Ferrier, 1854, 16 D. 422.

office, such as a station in the case of a railway company, is situated and in which it carries on business, only if the action be one the cause of which has arisen within the county to the jurisdiction of which it is thereby rendered subject.[1]

The Sheriff Court Act of 1876 extended the common law jurisdiction by providing that a person carrying on a trade or business, and having a place of business within a county, should be subject to the jurisdiction thereof in any action, notwithstanding that he had his domicile in another county, provided he were personally cited at such place of business.[2] "Person" was by the Act defined to include "company, corporation, and firm."[3] Provision was, however, further made by the Act that it should be in the power of the Sheriff, upon sufficient cause shown, to remit the action to the Court of the defender's domicile in another Sheriffdom.[4] Under the provisions of the Act it was necessary, to constitute jurisdiction, that besides carrying on and having a place of business within the county, the defender should have a domicile in another county. The jurisdiction did not therefore apply to the case of a person who was not domiciled in Scotland. Further, the defender must, besides having a place of business within the county, have actually "carried on" business within it. What precisely came within the category of "carrying on" business gave rise to some judicial dubiety. It was, however, settled that a defender who was represented in the Sheriffdom merely by an agent, did not carry on business within the jurisdiction in the sense of the Act.[5] So an English company who carried on business in Scotland through local representatives, who procured orders and were paid by commission, using their own business premises for the purpose, were held not to carry on business in Scotland in the sense of the Statute.[6] And it was also settled that the jurisdiction was not limited, as it is in certain cases at common law, to actions connected with or directly arising out of business or trade carried on within the county. Thus, where an action of damages, the cause of which arose in Dumbartonshire, was brought against a railway company whose head or principal office was situated in Edinburgh, it was held that the company was

[1] Edward *v.* Inverness and Aberdeen Rly. Co., 1862, 4 Irv. 185.
[2] S. 46.
[3] S. 3.
[4] S. 46.
[5] Laidlaw *v.* Prov. Plate Glass Ins. Co., 1890, 17 R. 544.
[6] Roberts *v.* Provincial Homes Invest. Co., 1907, S.C. (J.) 7.

properly cited in Glasgow, where they had one of their principal offices, and that the action was therefore competently brought in the Sheriff Court of Lanarkshire.[1] The difficulty which the Courts experienced in defining what actually fell within the definition of a "trade or business," may be illustrated by a case in which the fact that a defender was a joint-tenant of a farm in Scotland, though resident in Ceylon, was held to confer no jurisdiction on the Sheriff of the county in which the farm was situated, on the ground that farming was not carrying on a trade or business, and that a farm could not therefore be considered a place of business.[2] Similarly, a defender resident in Edinburgh, who as judicial factor on the estate of a deceased farmer in Lanarkshire realised the moveable estate by selling the crop and stocking of the farm, was held not to be subject to the jurisdiction of the Sheriff of Lanarkshire, in respect that he was not carrying on a trade or business within that county and had no place of business there.[3] And so, executors who obtained confirmation in the Sheriff Court of the deceased's domicile were held not to fall within the provisions of the Act.[4] Under the provisions of the Act the citation of the defender required to be either personal, whether within or without the county, or at the place of business, either by officer or by post. Where the defender resided in another county, personal citation was necessary, citation by post being insufficient; though, of course, if the defender chose to appear in answer to an illegal citation he was barred *personali exceptione* from objecting thereto.[5] The jurisdiction was expressly extended by a later Act to the Small Debt Court.[6]

The Act of 1907 still further extends the provisions of the common law. The word "trade" in the section of the Act of 1876 is now deleted, all that is necessary to found jurisdiction being that the defender shall carry on, and have a place of, business within the county, and that he shall be cited either at such place of business

[1] Jack v. N. B. Rly. Co., 1885, 12 R. 1029; Marshall *v.* Cal. Rly. Co., 1900, 2 F. 147.

[2] M'Bey *v.* Knight, 1879, 7 R. 255.

[3] Ferguson *v.* Dyer, 1882, 9 R. 671.

[4] Halliday's Exr. *v.* Halliday's Exrs., 1886, 14 R. 251.

[5] *See* Mouat *v.* Shaw Stewart, 1891, 18 R. 876: the rubric is somewhat misleading; the opinions of the learned Judges would seem, if read perfunctorily, to lend some countenance to the view that citation by post would, in the case of a defender resident in another county, be sufficient. *See* Sheriff Court Act, 1876, s. 12, (2) and (3), and Citation Amend. Act, 1882, s. 3.

[6] Small Debt Amend. Act, 1889, s. 5.

or personally. As the defender is not required, either actually or inferentially, to possess a domicile in Scotland, jurisdiction may now be constituted against foreigners and persons resident furth of Scotland. In view of the decisions under the previous Act, that such occupations as farming did not fall within the category of a "trade or business," it seems at least doubtful whether the Courts will be disposed to give a wider interpretation to the word "business" when it occurs by itself, unqualified by the adjection of the words "trade or," than they previously felt themselves at liberty to do, even if the learned Judges do not feel themselves bound by the terms of the *dicta* in former cases. Certainly the word "business" taken by itself, and without relation to the terms of previous decisions, would seem sufficiently comprehensive to obviate any doubts as to the kind of persons to whom the terms of the section might reasonably be expected to apply, and to include within its category all persons engaged in any occupation whatever by which a profit is made or a livelihood earned, whether as farmers, merchants, lawyers, doctors, or tradesmen.[1] The definition clause of the Act provides that the word "person" includes company, corporation, or association, and firm of any description, nominate or descriptive, or any board, corporate or uncorporate,[2] and the Act further provides that any such corporation, firm, or board may competently be cited at their principal place of business (which term includes the office or place of business of the clerk or secretary of any board or corporation), or if the principal place of business be outwith the jurisdiction, at *any* place of business within the jurisdiction.[3] The jurisdiction is wholly independent of the fact that the action relates or does not relate to the business of the company, firm, or board carried on within the jurisdiction, and is dependent solely on the fact that the company, firm, or board has, as a matter of fact, a place of business of any sort within the county, and that it actually carries on business there. In one case it was held that a foreign firm carrying out a contract in this country carried on a business, though it was averred that they only used as an office a wooden building which was occupied by a timekeeper, a clerk, and the manager who had charge of the contract.[4]

[1] *See*, as to meaning of word business, Muat *v.* Lee, 1890, 17 R. 371.

[2] Act, s. 3.

[3] Act, Rule 11; Harris *v.* Gillespie & Co., 1875, 2 R. 1003.

[4] Hughes *v.* Stewart, 1907, S.C. 791.

**5. Arrestment of Property within Sheriffdom.**—Jurisdiction is, by the provisions of the Act of 1907, conferred on the Sheriff in the case of a person not otherwise subject to the jurisdiction of the Scots Courts, by the arrestment within the jurisdiction of a ship or vessel of which he is owner or part owner or master, or of goods, debts, money, or other moveable property belonging to him. The jurisdiction extends, therefore, over all foreigners and persons residing furth of Scotland, provided the defender, on any legal ground of jurisdiction, is amenable to the jurisdiction of the Sheriff before whom he is convened. At common law, an arrestment against a foreigner not also personally cited within Scotland, does not found jurisdiction in the Sheriff Court,[1] though a foreigner may by his action bar himself from pleading the want of jurisdiction in the Supreme Court.[2] Prior to the Act of 1877, jurisdiction against a foreigner might competently be founded by precept of arrestment from the Sheriff, but the action following upon such arrestment was incompetent in the Sheriff Court. The Act of 1877 made an action competent in the Sheriff Court, by providing that the arrest within the Sheriffdom of a ship or other vessel belonging to a foreigner, or of which he was part owner or master, should found jurisdiction in any action over that foreigner, provided it was one which was competent in a Sheriff Court against a Scotsman subject to the jurisdiction thereof. The arrestment *ad fundandam jurisdictionem* of property of *any* kind subjected a foreigner to the jurisdiction of the Sheriff in maritime actions, but only in maritime actions.[3] But the restriction which confined the jurisdiction, in all save maritime actions, to cases in which a ship or vessel was the subject of arrestment, was meaningless, and founded on no definite or recognised principle. The recent Act, however, effectually removes that anomaly, by permitting the pursuer of an action to raise that action before the Sheriff within whose jurisdiction effective arrestments have been used against the defender *jurisdictionis fundandæ causa*, whatever be the nature of the subjects arrested, in the same manner as was previously competent only in maritime causes. The jurisdiction of the Sheriff is now therefore as regards foreigners on all-fours with that of the Supreme Court.

[1] Burn *v.* Purvis, 1828, 7 S. 194; Harvey, Hall, & Co. *v.* Black, 1831, 9 S. 785.

[2] White *v.* Spottiswoode, 1846, 8 D. 952.

[3] 11 Geo. IV. & 1 Will. IV. c. 69, s. 22; Sh. Ct. Act, 1838, s. 21.

In the case of a ship, she must be actually within the limits of the jurisdiction at the time when the arrestment is used, and once she is free of that jurisdiction the power of arrestment does not confer any power to pursue her or bring her back to the jurisdiction.[1] When the master of an arrested ship broke the arrestment and sailed away, it was held that the defenders must consign or find caution within a fortnight, under reservation of their right to apply for recall of the arrestment.[2] Like other arrestments on the dependence, the expenses of laying it on must be defrayed by the arrester,[3] and it may always be recalled on consignation.[4] But as the pursuer is not entitled to the expense of using the arrestment, so the defender is not entitled to the expense of having it removed.[5] Separate precepts of arrestment are issued by the Sheriff-Clerk upon production to him of a writ containing pecuniary conclusions upon which a warrant of citation has been granted, or of a liquid document of debt.[6]

An error in the description of a person against whom an arrrestment is used will make it invalid against him, but not against another rightly described.[7] For the purpose of founding jurisdiction, any property, however small its value, is sufficient, provided it is not wholly illusory, all that is necessary being that there should be some "property," corporeal or incorporeal, belonging to the defender which is capable of attachment in the hands of the arrestee. What exactly constitutes illusory property is not capable of exact definition. The arrestment *ad fundandam jurisdictionem* proceeds on the hypothesis that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. The ultimate test, therefore, of the validity of such an arrestment is whether it purports to affect any property or fund which might be taken in execution.[8] Of corporeal objects, a sum of 9s. 3d.[9] and a brass door-plate[10] have each been held sufficient; while books and documents of no commercial

[1] Carlberg *v.* Borjesson, 1877, 5 R. 188; 1878, 5 R. (H.L.) 217.

[2] Meron *v.* Umland and Others, 1896, 3 S.L.T. 444 (O.H.)

[3] Black *v.* Jehanjeer Framjee, 1887, 14 R. 678.

[4] Stewart *v.* MacBeath, 1882, 10 R. 382; M'Phedron & Currie *v.* M'Callum, 1888, 16 R. 45.

[5] Roy *v.* Turner, 1891, 28 S.L.R. 509.

[6] Act, Rule 45.

[7] Gibson *v.* Smith, 1849, 11 D. 1024.

[8] Leggat Bros. *v.* Gray, 1908, S.C. 67, *per* Ld. Kinnear.

[9] Ross *v.* Ross, 1878, 5 R. 1013.

[10] Dalrymple *v.* Lancs. Trust, etc., Co., 1894, 2 S.L.T. 79 (O.H.).

value,[1] such as travellers' sample books,[2] have been held to be insufficient. Of incorporeal objects, a general liability to account will as a rule be sufficient, unless it can be shown that there is no balance due by the arrestee.[3] So shares in a joint-stock company [4] and a conditional or contingent right [5] have each been held to be sufficient. Whatever be the subject of arrestment, whether corporeal or incorporeal, there must be an actual liability on the part of the arestee either to account for money or to deliver goods to the defender.[6] Thus, where arrestments were used in the hands of the factor of the debtor, who had managed his estates in Scotland, it was held that no funds had been attached, since prior to the date of the arrestment the estates had been sold and the incoming rents assigned to the purchaser.[7] In one case a pursuer was indebted to the defender, and his law agent, in order to pay the sum due, handed to the defender's law agent at Paisley a cheque drawn by his client upon a branch of the Bank of Scotland in Glasgow. The defender's law agent thereupon handed the cheque to his bankers, a branch of the National Bank at Paisley, for collection, and the bank in turn sent it to their head office in Glasgow. As soon as the cheque had been presented and honoured, and before intimation thereof had been made to the branch of the National Bank at Paisley or to the defender's agent, the pursuer arrested all sums due by the defender's agent to the defender, and it was held that the arrestment validly attached the proceeds of the cheque.[8] In another case, the defenders, an English company, supplied the pursuers with certain goods, which the latter rejected as disconform to contract and refused payment. The defenders thereupon requested them to return the goods, and while the goods were in the hands of the

[1] Trousdale's Trs. *v.* Forcett Rly. Co., 1870, 9 M. 88.

[2] Millar & Lang *v.* Polak, 1907, 14 S.L.T. 788 (O.H.); Millar & Lang *v.* Poole, 1907, 15 S.L.T. 76 (O.H.).

[3] Napier, Shanks, & Bell *v.* Halvorsen, 1892, 19 R. 412; Baines & Tait *v.* Compagnie Général des Mines d'Asphalte, 1879, 6 R. 846.

[4] American Mortgage Co. *v.* Sidway, 1908, S.C. 500, *appg.* Sinclair *v.* Staples, 1860, 22 D. 600.

[5] MacLaren *v.* Preston, 1893, 1 S.L.T. 75 (O.H.).

[6] Parnell *v.* Walter, 1889, 16 R. 917; Macquire *v.* Smith, 1889, 27 S.L.R. 14; Young *v.* Actiebolaget Ofnerums Bruk, 1890, 18 R. 163; Heron *v.* Winfield, 1894, 22 R. 182; Whittall *v.* Christie, 1894, 22 R. 91.

[7] Union Bank of Scot. *v.* Donnington's Trs., 1901, 8 S.L.T. 404, (O.H.). *See also* Hope's Trs. *v.* Hope, 1904, 11 S.L.T. 625 (O.H.).

[8] Pollock, Whyte, & Waddell *v.* Old Park Forge Ltd., 1907, 15 S.L.T. 3 (O.H.); *cf.* Millar & Lang *v.* Poole, *sup.*

railway company *in transitu* they were arrested by the pursuers, and it was held that the arrestments validly founded jurisdiction against the defenders.[1] As between a debtor and his creditor, the delivery of a cheque payable on demand is, according to the intention of both parties, payment of the debt, though there may be a contingent liability still in the debtor if it should turn out that the cheque is not cashed. But in a case where the defender received a cheque from the arrestee in payment of a debt, it was held that arrestment of the debt in the hands of the arrestee before payment of the cheque by the bank attached nothing.[2] The point of time to ascertain whether anything has been arrested is the date of citation.[3] The arrestment may be used at any time before defences are lodged,[4] though if possible it should be effected before or simultaneously with the service of the writ. If the arrestment is served before the writ, it is not clear when the writ must be served thereafter.[5] The object and effect of the diligence being solely to found jurisdiction against a person not otherwise amenable to it, the arrestment *ad fundandam jurisdictionem* creates no *nexus* on the property arrested,[6] so that when jurisdiction has been constituted by citation, the use of the arrestment is at an end. The fund may therefore be paid away by the holder or arrested by a third party, and if the original arrester desires to secure it, it must be again arrested on the dependence by him.[7] Further, it applies only to the action for the purpose of instituting which it was used, and a fresh arrestment must be used for every subsequent action, whether by the same pursuer or another.[8] The arrestment is personal, and falls by the death of the person against whom it was used to found jurisdiction.[9] Arrestments found jurisdiction in an action not only as it is originally laid, but as it may be competently amended.[10] The arrestment of the property of a foreigner confers jurisdiction upon

[1] Braby & Co. Ltd. *v.* Danks & Co., 1907, 15 S.L.T. 161 (O.H.).

[2] Leggat Bros. *v.* Gray, *sup.*

[3] North *v.* Stewart, 1890, 17 R. (H.L.), 60, *per* Ld. Watson.

[4] Wall's Trs. *v.* Drynan, 1888, 15 R. 359.

[5] Jacobo *v.* Scott, 1895, 2 S.L.T. 455 (O.H.); Craig *v.* Brunsgaard, etc., *infra.*

[6] Craig *v.* Brunsgaard Kjosternd, 1896, 23 R. 500; Leggat Bros. *v.* Gray, *sup.*

[7] North *v.* Stewart, *sup.*, *per* Ld. Watson.

[8] Goodwin & Hogarth *v.* Purfield, 1871, 10 M. 214; Andersen *v.* Harboe, 1871, 10 M. 217.

[9] Cameron *v.* Chapman, 1838, 16 S. 907.

[10] Hope *v.* Derwent Rolling Mill Co., 1905, 7 F. 837.

the Courts of this country to sue the foreigner not only for a debt contracted in this country, but for one contracted abroad.[1] Arrestments to found jurisdiction do not appear to confer jurisdiction to entertain declaratory conclusions,[2] though they appear to be sufficient for the pronouncement of decrees *ad factum præstandum*.[3]

**6. Property situated within the Sheriffdom.**—(1) *Where the property is not the subject in dispute.*—(*a*) Ownership of heritable property in a county does not at common law *per se* render the owner subject to the jurisdiction of the Sheriff in a personal action.[4] Jurisdiction over the owner of heritable property is conferred upon the Sheriff, at common law, only where the action relates to such property or to the defender's interest in it.[5] (*b*) Nor does the ownership of moveable property within the Sheriffdom, when such property is not the subject of dispute, subject the owner to the jurisdiction of the Sheriff, unless such property have been the subject of arrestment to found jurisdiction against him. But arrestment of moveable property *ad fundandam jurisdictionem* is, as has been seen, competent only in the case of persons who are not otherwise subject to the jurisdiction of the Scots Courts. At common law, an arrestment against a foreigner, who is not also personally cited within Scotland, does not found jurisdiction in the Sheriff Court.[6] A foreigner may, however, by his actings bar himself *personali exceptione* from pleading want of jurisdiction.[7] The provisions of the Act do not in any way alter or affect the rules of the common law on the subject.

(2) *Where the property is the subject of dispute.*—(*a*) In all actions relating to the possession of heritable property or to his interest in it, an owner of such property is at common law amenable to the jurisdiction of the Sheriff of the county in which such property is situated, though he does not reside or has not been personally cited within the jurisdiction. The jurisdiction of the Sheriff is, however, limited to that class of action which has for its object the mainten-

[1] Tyne Improvement Comrs. *v.* Actieselkabet Aalborg Dampshibsselskab., 1905, 12 S.L.T. 693 (O.H.).

[2] Williams *v.* Roy. Coll. of Vet. Surgeons, 1897, 5 S.L.T. 275 (O.H.).

[3] Powell *v.* Mackenzie & Co., 1900, 8 S.L.T. 500 (O.H.).

[4] M'Bey *v.* M'Knight, 1879, 7 R. 225 ; *approved* Comrs. of Pollokshaws *v.* M'Lean, 1899, 2 F. 96 ; Maxwell *v.* Horwood's Trs., 1902, 4 F. 489.

[5] *See* Comrs. of Pollokshaws *v.* McLean, *sup.*

[6] Burn *v.* Purvis, 1828, 7 S. 194 ; Harvey, Hall, & Co. *v.* Black, 1831, 9 S. 785.

[7] White *v.* Spottiswoode, 1846, 8 D. 952.

ance of the existing state of the possession of heritable property, and of things locally situated within the county.[1] Thus an action of interdict is competent at common law at the instance of a local authority to restrain an owner of heritable property from making use of a supply of water which he had obtained for a limited purpose by agreement with the local authority, for the benefit of property other than that for which the supply was granted.[2] It is, of course, immaterial in such questions whether the defender is a foreigner who otherwise is not subject to the jurisdiction of the Scots Courts, or a native who otherwise happens to be amenable only to the jurisdiction of another Sheriffdom.

But the mere fact that the subject in dispute happens to be within the jurisdiction has, in certain cases at common law, been held to confer jurisdiction on the Sheriff, and therefore to subject the persons interested in such subjects to the jurisdiction also. The cases in which such jurisdiction has been held to be conferred are of a limited class. Thus an action of removing, not containing personal conclusions, has been held to be competent in the Sheriffdom in which the subjects were situated, although the defender was not personally otherwise subject to the jurisdiction.[3] On similar grounds, an action of ejectment from premises situated within the jurisdiction and wrongfully occupied by the defender's goods, would probably be competent, as would an action against a person, not otherwise subject to the jurisdiction, to compel him to deliver goods lying within the jurisdiction, which he, by himself or his agents, had wrongfully failed to deliver.[4] So also an action for warrant to sell goods and consign the price, so as to save the cost of warehousing, pending the settlement of a dispute as to their price between the parties in another Court, has been held to be competent in the Sheriff Court of the county where the goods were lying.[5] The Sheriff Court Act of 1877 provided[6] that in actions relating to questions of heritable right and title (including actions of declarator, but excluding actions of adjudication, save in so far as then competent,

[1] Comrs. of Pollokshaws *v.* M'Lean, 1899, 2 F. 96, *per* Ld. M'Laren.

[2] Culross Water Supply *v.* Smith Sligo's Trs., 1891, 19 R. 58; *see* Mouat *v.* Lee, 1891, 18 R. 876.

[3] Williamson *v.* Haigie, 1635, M. 4815.

[4] *See* Scot. Central Rly. Co. *v.* Ferguson, Rennie & Co., 1863, 1 M. 750, *per* Ld. Deas.

[5] Bannatyne *v.* Newendorff, 1841, 3 D. 429.

[6] Sec. 8.

and excluding actions of reduction), where the value of the question in dispute did not exceed £50 yearly or £1000 in all, and in actions of division of commonty, of division, and of division and sale of common property where the value of the subject in dispute did not exceed £50 yearly or £1000 in all, the Sheriff Court should have jurisdiction, provided the action were raised in the Sheriff Court of the county in which the property forming the subject in dispute was situated, all parties against whom any such action might be brought being subject in such action to the jurisdiction. Thus, in an action brought in the Sheriff Court by the owner of a building within the county against the owner of an adjoining building who was resident in England, for half the cost of a mutual gable, it was held that the Sheriff had jurisdiction in respect that the action was one which had reference to a question of heritable right or title.[1] The recent Act, however, extends the limits within which the scope of the jurisdiction was confined by the Act of 1877. It provides, in the first place, that all actions of declarator relating to heritable property, without restriction as to pecuniary limit, and all actions of division of commonty, of division, and of division and sale of common property, and actions relating to question of heritable right or title (except actions of adjudication save so far as formerly competent and actions of reduction), including all actions of declarator of irritancy or removing, whether at the instance of a superior against a vassal or of a landlord against a tenant, and without restriction as to limit in respect of the pecuniary value of the subjects in dispute, are competent in the Sheriff Court, and all parties against whom any such action may be brought are subject to the jurisdiction of the Sheriff, the ground of jurisdiction being, that though the parties themselves may not be otherwise amendable to the jurisdiction, the fact that the property about or in relation to which the question in dispute has arisen is situated within the jurisdiction, creates a jurisdiction over the parties themselves.

And, in the second place, the Act provides that where the defender is owner, part-owner, tenant, or joint-tenant, whether individually or as a trustee of heritable property within the jurisdiction, and the action relates to such property or to the defender's interest in it, such action shall be competent in the Sheriff Court. The "ownership" contemplated by the Act is presumably the actual

[1] Stark's Trs. *v.* Cooper's Trs., 1900, 2 F. 1257.

beneficial right in the property, irrespective of the actual state of the title to it. Thus a person who has concluded an *ex facie* regular contract for the purchase of heritage in Scotland, is amenable to the jurisdiction of the Sheriff within whose territory the subjects are situated in any action relating to it.[1] And where in an action by a wife against her husband for a declarator that sums contained in bonds and dispositions in security over heritage in Scotland, belonged to her, the defender pleaded no jurisdiction on the ground that he resided in India, it was held that he was amenable to the jurisdiction of the Scots Courts as the "owner" of heritage in Scotland.[2] The ownership must subsist at the date of the action, and the fact that a foreigner was, up to within a few days of citation, an owner of heritage, did not render him subject to the jurisdiction of the Scots Courts.[3] The Act, therefore, in this section incorporates the provisions of the common law, but it removes the barriers, in the shape of pecuniary limitation of value, imposed upon the Sheriff Court by the Act of 1876. In the result, it seems clear that every kind of action which is relevant against an owner or occupier of heritable property with reference either to the property itself or to such owner's or occupier's interest in it, save such as are specifically excepted by Statute, is now competent in the Sheriff Court of the Sheriffdom in which the property is situated.[4] (*b*) As in the case of heritable property, the mere fact of the possession of moveable property within a county does not *per se* confer jurisdiction on the Sheriff Court of that county. Under the Act of 1876, if in actions of furthcoming or multiplepoinding the arrestee or holder of the fund *in medio* resided within the territory, the action might competently be raised there, though the common debtor or the claimants respectively resided elsewhere. The recent Act, however, provides that not only in such cases, but also where the fund *in medio* is itself situated within the jurisdiction, the action is competent in the Sheriff Court.[5]

**7. Interdict against Delict within Sheriffdom.**—Where the action is one for interdict against an alleged wrong being committed or threatened to be committed within the Sheriffdom, the action may be brought in the jurisdiction of the commission of the wrong,

[1] Thorburn *v.* Dempster, 1900, 2 F. 583, *per* Ld. Low.

[2] Love *v.* Love, 1907, S.C. 728.

[3] Buchan *v.* Grimaldi, 1905, 7 F. 917.

[4] *See* Mouat *v.* Lee, 1891, 18 R. 876; Maxwell *v.* Horwood's Trs., 1902, 4 F. 489.

[5] *See infra*, p. 48.

although the defender is not personally otherwise subject to that jurisdiction. It has long been settled that the commission of a delict or quasi-delict, such as slander, within a Sheriffdom renders the wrong-doer subject to that jurisdiction in an action of damages founded upon it, even though he be not, *ratione domicilii*, subject to any jurisdiction in Scotland, provided only he be personally cited within the territory.[1] And the Courts in Scotland will grant protection to a foreigner against a wrong threatened him in Scotland, either on the part of a Scotsman or of another foreigner. Thus interdict was granted to a foreigner against an infringement of a patent, though both pursuer and defender were English.[2] The Act incorporates the common law, and it is therefore competent under its provisions not only to sue the wrong-doer for reparation in respect of a delict which he has already committed, but to interdict him against any threatened or continued commission of the wrong complained of. The action of interdict is personal, and the provision of means whereby the commission of the wrong may be interdicted, even if the defender be not otherwise amenable to the jurisdiction, is an inversion of the rule which requires that a personal action against a defender must be brought in the Court to whose jurisdiction he is personally subject. An action of interdict appears to be undoubtedly competent against a Scotsman who is resident or carries on business in another Sheriffdom, and there is nothing in the provision which makes it incompetent against a foreigner. It does not appear to be necessary that the defender should be cited personally within the territory or that arrestments should be used to found jurisdiction against him. The Act founding the interdict *ipso facto* renders the defender subject to the jurisdiction. But jurisdiction against a foreigner will probably not be sustained unless he is personally cited within the jurisdiction. An action of delict being personal and, where there are several defenders, the liability being *singuli in solidum*, the action is competent against any one of several defenders, and where only one of several defenders is sued, the plea that all parties have not been called will not be sustained.[3]

[1] Kermick *v.* Watson, 1871, 9 M. 984.

[2] Toni Tyres Ltd. *v.* Palmer Tyres Ltd., 1905, 7 F. 477 ; *see* Gill *v.* Cutler, 1895, 23 R. 371.

[3] Sim *v.* Muir's Trs., 1906, 8 F. 1091 ; *see infra*, Commission of Delict in Sheriffdom.

**8. Contract to be performed in Sheriffdom.**—Where the action relates to a contract, the place of execution or performance of which is within the jurisdiction, the defender is subject to the jurisdiction of the Sheriff provided he be personally cited within the Sheriffdom. The Court of Session has at common law jurisdiction over persons resident, for however short a time, in Scotland upon whom personal service has been made within Scotland, in actions the cause of which has arisen within the kingdom. Among such actions may be instanced those for the restitution of moveables recently seized or held in Scotland for the payment of goods newly bought for ready money, or for the aliment of a child also present in Scotland,[1] the principle at the foundation of such jurisdiction being that where the cause of action, be it contract or delict, clearly arises and occurs within the territory, the defender, if cited personally within the territory, shall be amenable to the jurisdiction in respect of such contract or delict.[2] Upon this principle there is jurisdiction in actions for breach of promise of marriage made in Scotland,[3] and for defamation uttered in Scotland.[4] In actions founded on or arising out of contract, whether for implement or for breach of the contract, it is sufficient to found jurisdiction against the defender, that the place of implement or execution is in Scotland, even though the place where it is actually made happens to be furth of Scotland. Thus the conclusion of a formal and effectual contract by a foreigner for the purchase of heritage within Scotland is sufficient to found jurisdiction against him in the Scots Courts in an action founded on the contract, provided, of course, he is personally cited within Scotland. The contract need not be one to give a complete feudal title to land, a personal right under a disposition, a mere title of appearance without any beneficial interest in lands held in trust, or a lease of heritable subjects being sufficient.[5] The jurisdiction of the Sheriff Court in such actions is at common law similar to and co-extensive with that of the Court of Session, but just as in an action before the Supreme Court the Defender must be personally cited within

[1] Ringer *v.* Churchill, 1840, 2 D. 316, *per* Ld. Mackenzie, *approved by* L. J.-C. Inglis *in* Pirie *v.* Warden, 1867, 5 M. 500.

[2] Johnston *v.* Strachan, 1861, 23 D. 769, *per* L. J.-C. Inglis. *See infra*, Delict committed within Sheriffdom, p. 52.

[3] Sinclair *v.* Smith, 1860, 22 D. 1475.

[4] Kermick *v.* Watson, 1871, 9 M. 984.

[5] Thorburn *v.* Dempster, 1900, 2 F. 117, *per* Ld. Low.

Scotland, so in the case of an action in the Sheriff Court the Defender must be cited personally within the Sheriffdom.[1] The rule that the Sheriff has no jurisdiction over persons *ratione contractus* unless such persons have been cited personally within the Sheriffdom, applies even where the contract has reference to heritable property belonging to the defender and situated within the jurisdiction.[2] And it is at common law immaterial that the defender happens to be a foreigner. Thus, in one case, a maritime action to enforce a contract made abroad but which was to be performed in Scotland, was sustained, the defender, though a foreigner, having been personally cited within the Sheriff's jurisdiction.[3]

Jurisdiction *ratione contractus*, both in the Supreme and Sheriff Courts, is at common law confined to actions directly connected with the enforcement of the contract or to such as arise directly from its breach, and does not extend to actions incidental, ancillary, or "relating" to the contract.[4] Thus, where the action was one not to enforce the contract according to its terms, but for damages in respect that it had not been properly or completely fulfilled, it was held that it could not competently be brought in the jurisdiction of the *locus solutionis*, even though the defender were personally cited, unless he happened to be amenable to the jurisdiction on some other ground.[5] The provisions of the Act, in so far as they provide that the Defender shall be subject to the jurisdiction where the action "relates" to the contract, would appear, when taken literally and without reference to the existing common law, to confer upon the Sheriff Court not only an extension of jurisdiction, but one superior even to that of the Supreme Court. The fact that the Act, however, is professedly one to regulate and amend the law and practice relating to the Sheriff Court, would appear to warrant the conclusion that where its terms do not clearly and unequivocally confer an extension of jurisdiction or power, they cannot be held to be conferred merely by implication. The terms of the section therefore may presumably be held to apply only to such actions as are competent at common law, and only to such actions as deal with questions arising between the contracting parties.

[1] *See* Bird *v.* Brown, 1887, 25 S.L.R. 1 (J.C.).

[2] Maxwell *v.* Horwood's Trs., 1902, 4 F. 489.

[3] Pirie *v.* Warden, *supra.*

[4] Sinclair *v.* Smith, *supra.*

[5] Logan *v.* Thomson, 1859, 3 Irv. 323.

**9. Fund *in medio*, Arrestee, or Holder of Fund in Sheriffdom.**—The mere existence of either heritable or moveable property belonging to the defender will not in general, as has been seen, give jurisdiction against him.[1] But in the actions of furthcoming or multiplepoinding, where the fund *in medio* is situated within the jurisdiction, or where the arrestee or holder of the fund is subject to the jurisdiction of the Court, the Sheriff has jurisdiction, even though the common debtor or the claimants to the fund respectively are resident in other parts of Scotland or even abroad. An action of multiplepoinding is competent where the fund consists entirely of heritage.[2] An action of furthcoming prior to the Act of 1876 had to be brought in a Court to the jurisdiction of which both the arrestee and the common debtor were subject.[3] The Act of 1876 provided that such actions might be brought in the Sheriff Court to the jurisdiction of which the arrestee was subject, even though the common debtor might not be resident within the jurisdiction.[4] That provision is repeated in the recent Act. The essence of an action of multiplepoinding is that the holder of the fund *in medio* is subject to double distress, and the primary object of the action is to obtain his exoneration. The Act of 1876 provided that any person entitled to raise the action might competently bring it in the Court to whose jurisdiction the holder of the fund *in medio* was subject. But the holder has obviously only a nominal interest in the fund, the claimants being the persons who possess the real or substantial interest in it. The *forum conveniens* is not necessarily that to whose jurisdiction the holder is subject, but is often that in which the actual subject in dispute is situated. Accordingly, the recent Act provides that the action is competent not only in the *forum* to which the holder is subject, but also in that in which the fund *in medio* itself is situated. The real raiser of the action has therefore now a choice of jurisdictions, but to prevent hardship from the fact that the action may be brought in the *forum* which, in the interest of all parties, is the least convenient, provision is made that the Sheriff may, upon sufficient cause, by interlocutor stating his reasons, remit a cause to another Sheriffdom, such interlocutor, when issued by a Sheriff-Substitute, being, by

[1] *See supra*, p. 41.

[2] Boyd's Trs. *v.* Boyd, 1906, 13 S.L.T. (O.H.) 878.

[3] Wightman *v.* Wilson, 1858, 20 D. 779.

[4] Sh. Court Act, 1876, s. 47.

his leave, appealable to the Sheriff within seven days, but thereafter final.[1]

**10. Ex reconventione.**—Where the party sued is the pursuer in any action pending within the jurisdiction against the party suing, such party sued is subject *ex reconventione* to the jurisdiction. At common law a pursuer, though not otherwise subject to the jurisdiction of the Court, by recognising that jurisdiction renders himself liable to actions at the instance of the party he has himself called into Court, provided such actions arise out of the same transaction or are *ejusdem generis* or *ex eodem negotio.* The principle of reconvention is that a party is not entitled to take the benefit of the jurisdiction of our Courts and at the same time to refuse that jurisdiction in relative matters,[2] and the object of the rule (which, though strictly rather a rule of pleading than a ground of jurisdiction, results in conferring jurisdiction where it otherwise would not exist)[3] is to place the pursuer and defender on a footing of equality, as though both were equally subject to the same jurisdiction, and to prevent the defender being prejudiced by the fact that the pursuer is not so subject. Jurisdiction *ex reconventione* is therefore not available to give a defender a remedy which would not have been available to him had the pursuer been subject to the jurisdiction, instead of being a foreigner.[4] Nor is it available where the person reconvened has submitted himself to the jurisdiction, not from choice but of necessity. Thus a foreigner who of necessity appeals to the Scots Courts for the purpose of suspending a threatened charge upon a bill, and thereby excluding the jurisdiction of the Courts, does not submit himself to the jurisdiction of the Courts *ex reconventione.*[5] In the Sheriff Court, therefore, as in the Supreme Court, a foreigner may be made amenable to the jurisdiction in which he is the pursuer of an action.[6] Some difficulty has been experienced in defining the exact extent of the jurisdiction at common law in actions founded *ex reconventione.* There must, however, in the first place be an action between the same parties actually in dependence at the time the

[1] Act, Rule 20.

[2] Morrison *v.* Milne & Massa, 1865, 5 M. 130, *per* Ld. Deas.

[3] Thomson *v.* Whitehead, 1862, 24 D. 331, *per* Ld. Pres. Inglis.

[4] Barr *v.* Smith, *infra.*

[5] Davis *v.* Cadman, 1897, 24 R. 297.

[6] Barr *v.* Smith, 1879, 7 R. 247; Stewart *v.* Jarvie, 1873, 17 J. of J. 607; Colville *v.* Colville, 1891, 35 J. of J. 500.

second action is brought.[1] If the first action have actually been concluded, so that the pursuer of it is no longer before the Court, jurisdiction against him *ex reconventione* will not be sustained.[1] But the pursuer of the first action is still before the Court if, while the merits have been disposed of, the question of expenses still remains for decision.[2] Further, the parties to the action must be the same, and in this sense not only pursuer and defender but competing claimants are same parties to an action.[3] But where a claim is lodged in a multiplepoinding by a person not subject to the jurisdiction, that fact does not entitle a person who lodges a riding claim on such claim to sue the claimant in the jurisdiction.[4] And while in ordinary circumstances the action of the person not subject to the jurisdiction must precede that in which he is sought to be convened, it is sufficient if that action is actually in dependence when objection to the jurisdiction *ex reconventione* is actually pleaded.[5] Thus, where an action is raised against a person not subject to the jurisdiction, and he, without first objecting to the jurisdiction in the action raised against him, raises a counter action against the pursuer of that action, he will be barred *personali objectione* from afterwards pleading the want of jurisdiction.[5] But further, the two actions must be related. What the relation must be has never been precisely determined, but it is at least restricted to cases where the subject-matter of the actions is of the same nature, and they can be conveniently tried at the same time and brought to a conclusion by one judgment, or by two separate but contemporaneous, or nearly contemporaneous, judgments.[6] Thus the claims must be either of the same kind or arising out of the same course of dealing.[7] So, where an action had been brought, jurisdiction *ex reconventione* in respect of a claim of damages for assault was not sustained.[8] The action in respect of which jurisdiction *ex reconventione* is sought to be established must be actually in dependence. Thus in one case a pursuer raised an action which contained slanderous imputations upon the defender.

[1] M'Ewen's Trs. *v.* Robertson, 1852, 15 D. 265; Longworth *v.* Yelverton, 1868, 7 M. 70.

[2] Baillie *v.* Hume, 1852, 15 D. 267; Allan *v.* Wormser, 1894, 21 R. 866.

[3] Mansfield Ramsay & Co., 1795, M. 2594; Colville *v.* Colville, *sup.*; Miller *v.* Ure, 1838, 16 S. 1204.

[4] Bell *v.* Stuart, 1852, 14 D. 837.

[5] Morrison *v.* Milne & Massa, *sup.*

[6] Thomson *v.* Whitehead, *sup.*, *per* Ld. Pres. Inglis.

[7] *See* Russ *v.* Russell, 1888, 4 S.L. Rev. 309.

[8] Thomson *v.* Whitehead, *sup.*

That action was never called, but subsequently the pursuer raised and called an action against the defender in which the slanderous imputations were not repeated. The Court held that in these circumstances it had no jurisdiction *ex reconventione* against the pursuer to entertain an action by the defender against him for damages for the slander contained in the abortive action.[1] But an action of reduction by a trustee in a sequestration of a preference claimed by a foreign creditor who had lodged a claim in the sequestration;[2] an action of delivery brought by the trustee in a sequestration against an English creditor who had lodged a claim; an action to prohibit a foreign company who had lodged a claim in a liquidation from proceeding in a foreign Court with reference to a question pending in the liquidation;[3] an action of damages for the oppressive use of diligence on the dependence of an action brought by a foreigner;[4] and a counter action of damages for collision when a foreigner brought one in respect of the same collision against the pursuer,[5] have all been sustained. It is doubtful whether the jurisdiction continues after decree; but it has been sustained where the action *ex reconventione* was brought after judgment but before extract in the other action.[6] While it is clear that actions *ex reconventione* are competent in the Sheriff Court against a foreigner, some doubt has been expressed as to the competency of any actions except such as arise out of the same facts in the case of a Scotsman resident in another Sheriffdom, and it has been maintained that the principles which operate in the case of the former do not, at least to their full extent, apply in the case of the latter. No express decision appears to have been given on the point, but it is a little difficult to see any sufficient reason for differentiating between the cases.[7]

The provisions of the Act, however, seem in terms sufficient not only to dispel all doubts, but to create a wide extension of the common law jurisdiction *ex reconventione*. The words of the section are not ambiguous, and they do not, as in the case of contract noticed above, simply appear to confer an extended jurisdiction merely by implication. In terms sufficiently concise they expressly

[1] Kinnison *v.* Stuart, 1903, 11 S.L.T. 103 (O.H.).

[2] Ord *v.* Barton, 1847, 9 D. 541; Barr *v.* Smith, *sup.*

[3] California Redwood Co. *v.* Merchant Bank. Co. of London, 1886, 13 R. 1202.

[4] Baillie *v.* Hume, *sup.*

[5] Morrison *v.* Milne & Massa, *sup.*

[6] Allan *v.* Wormser, 1894, 21 R. 866.

[7] *See pro et contra*, Mackay and Dove Wilson, *sub voce.*

confer the power "in *any* action pending within the jurisdiction against the party suing," and therefore they confer a jurisdiction on the Sheriff Court which, in actions *ex reconventione*, is equal to that of the Supreme Court. Such actions are therefore no longer limited to those arising out of the same transaction or *ejusdem generis* or *ex eodem negotio*, but are competent to a defender who possesses *any* ground for *any* action against a pursuer, whether a foreigner or a Scotsman resident in another Sheriffdom, who has raised an action in the Sheriff Court against him.

**11. Delict committed within Sheriffdom.**—Where the action arises out of delict committed within the Sheriffdom, the defender is subject to the jurisdiction of the Sheriff, provided he is personally cited within such jurisdiction. Personal service presumably means service by an officer of Court, and not by registered postal letter, in all cases where the service is an element in the constitution of the jurisdiction.[1] At common law the Sheriff has jurisdiction where the cause of action, whether contract or delict, clearly arises and occurs within the Sheriffdom, provided the defender is personally cited there,[2] and the Act incorporates the common law on the subject. In actions of delict the liability of the defenders, if more than one, is *singuli in solidum*. Where, therefore, one of several wrong-doers is cited to answer for the wrong done by himself and others associated with him in its commission, the action is competent, and the plea that all parties have not been called will not be sustained.[3] Similarly, in an action by two trustees against a third, or by a beneficiary against individual trustees, in respect of the commission of a wrong, such as the misappropriation of the trust funds, it is not necessary to call the trustees as a body as defenders to the action.[4] But in an action against several wrong-doers, it is incompetent to conclude "conjunctly and severally, or severally, according to their respective liabilities as may be established in this action" against separate parties for a lump sum of damages in respect of separate wrongs.[5] Where, however, the defenders are sued jointly and

[1] *See* Bird *v.* Brown, 1887, 25 S.L.R. 1; Davidson *v.* Gourlay, 1906, 14 S.L.T. 112 (O.H.).

[2] *See supra*, Kermick *v.* Watson, 1871, 9 M. 984.

[3] Sim *v.* Muir's Trs., 1906, 8 F. 1091.

[4] Beatt *v.* Ogg and Others, 1897, 4 S.L.T. 374 (O.H.); Mackay *v.* Mackay, 1897, 4 S.L.T. 466 (O.H.)

[5] Sinclair *v.* Caithness Flagstone Co., 1898, 25 R. 703, *following* Brown *v.* Neilson, 1868, 6 M. 651; *see* Caughie *v.* Robertson & Co., 1897, 25 R. 1.

severally, and the action is held relevant against only one of them, or the averments show that only one is liable, the action appears to be still relevant against the other.[1] And a conjunct and several conclusion directed against two defenders for a sum of money as damages due to the pursuer in respect of several wrongs done to him by them, is not rendered competent by the facts that the defenders are partnership firms and that one individual partner is a predominating member of both firms.[2] Where the ground of action against a defender is that he was the person responsible for the commission of the wrong, such as a breach of contract, it is competent to sue him in an action concluding for damages conjunctly and severally against the party who is in breach of contract, and him as the person who procured the breach.[3]

**12. Jurisdiction Prorogated.**—Where in any action competent in the Sheriff Court the defender prorogates the jurisdiction of the Court, he thereby renders himself subject to its jurisdiction. A person who is not subject to the jurisdiction of the Sheriff Court may at common law, and subject to certain conditions and exceptions, prorogate or consent to such jurisdiction. An objection which is merely personal to the defender may be waived either expressly or by implication. Thus a person may by written consent, as by letter or minute lodged in process, intimate that he prorogates the jurisdiction, either with reference to a particular cause, or generally to any action that may be brought against him in a particular Court with reference to a specified matter.[4] Or he may crave the Court before whom an action is brought to be sisted as a defender.[5] A defender is held to prorogate the jurisdiction by implication from the mere fact of appearing in the cause without taking objection,[6] though where the plea is stated and repelled the fact that he pleads other defences does not amount to a waiver of his objection.[7] But if he plead other objections, before pleading to the competency of the action on the ground of jurisdiction, he will be

[1] Hannay *v.* Muir, 1898, 1 F. 306; Robinson *v.* Reid's Trs., 1900, 2 F. 928, *per* Lord Moncreiff; *cf.* Wallace *v.* Braid, 1898, 6 S.L.T. 149 (O.H.), and Gibson *v.* Irvine, 1900, 7 S.L.T. 385 (O.H.).

[2] Hannay *v.* Muir, *sup.*

[3] Belmont Laundry Co. *v.* Aberdeen Steam Laundry Co., 1899, 1 F. 45.

[4] Longmuir *v.* Longmuir, 1850, 12 D. 926; Wright's Trs. *v.* MacLaren, 1891, 18 R. 841.

[5] Gill *v.* Cutler, 1895, 23 R. 371.

[6] Service *v.* Chalmers, 1627, M. 7305; *see* Mitchell *v.* J. & W. Stewart, 1907, 14 S.L.T. 685, 856.

[7] Shaw *v.* Buchanan, 1696, M. 7314.

held, on the other objections being repelled, to have impliedly waived his objection to the jurisdiction.[1] But no consent of parties will enable a Sheriff to exercise jurisdiction in a cause which is for any reason incompetent in the Sheriff Court. Thus a Sheriff cannot, even of consent, exercise jurisdiction in a cause which belongs to the exclusive jurisdiction of the Court of Session, as for instance in actions relating to *status* or reduction.[2] And a petition which is dismissed by the Sheriff on the ground that he has no jurisdiction, will not subsequently be adopted by the Supreme Court and treated as though it had originated there.[3] Where the jurisdiction is conferred by statute, or where it is dependent on the observance of statutory forms or provisions, these must be strictly observed, and the consent of parties to a departure from them will not supply the defect or enable the Sheriff to exercise his statutory jurisdiction. Thus the signing of a summons or of a warrant of citation by a person having no authority to do so, will invalidate all subsequent proceedings, even though the party cited appears and offers no objections.[4] But this rule does not apply in the case of minor forms, and such matters as the length of the *induciæ* or the necessity for personal service may be waived or dispensed with of consent without affecting the jurisdiction. These objections, however, apply only where the Sheriff exercises his jurisdiction in the capacity of a Judge, and have no application where he acts solely as an arbiter between the parties. But the prorogation in such cases must amount to a reference of the question in dispute, and the matter must be one which it is competent to refer. Where, in a judicial proceeding, the prorogation refers not to the process necessary to bring the jurisdiction into operation, but to the procedure in its subsequent progress, such prorogation takes the case *extra cursum curiæ*, and constitutes the Sheriff no longer a Judge but an arbiter, his judgment thereafter becoming a judgment of consent of parties and therefore not subject to review. It is, however, only when a party consents to a remit which is *extra cursum curiæ* that he is held to have put

[1] White *v.* Spottiswoode, 1846, 8 D. 952; *see infra*, Citation, p. 116, and Act, Rule 13.

[2] *See* Kennedy *v.* Kennedy, 1611, M. 7307; Ringer *v.* Churchill, 1840, 2 D. 307; Wylie *v.* Herit. Secs. Invest. Assocn., 1871, 10 M. 253.

[3] Gillan *v.* Barony Par. Council, 1898, 1 F. 183.

[4] Cuming *v.* Munro, 1833, 12 S. 61; Forrest *v.* Harvey, 1841, 4 D. 97, *affd.* 1845, 4 Bell's Ap. 197.

the Judge in the position of an arbiter and to be barred from getting the case restored to the ordinary procedure. A remit by a Sheriff to a man of skill to report on the condition of a boundary is not a proceeding *extra cursum curiæ*, and consequently his report does not exclude further inquiry.[1] And a mere deviation from the ordinary course of procedure, proceeding upon a slip in the conduct of the cause and not upon agreement to make such departure, is not equivalent to a submission of the questions in dispute to the Judge as arbiter.[2] Where, in a case which had been remitted for jury trial, proof was taken by consent of parties on commission, appeal was excluded on the ground that the Judge had become merely an arbiter in the cause.[3] So where, after a trial by jury, the parties consented to accept the decision of the Court on the report of the evidence of the Judge presiding at the trial;[4] where, after a verdict for pursuer, the Court, with the acquiescence of the parties, remitted the matter to an expert to carry out the verdict in the manner least prejudicial to the defender;[5] and where, in a complaint under the Summary Procedure Act, the parties consented that the Sheriff should decide the case on the notes of the evidence taken by the Sheriff-Substitute, instead of having the proof re-led.[6]

The provisions of the Act, therefore, merely incorporate and give statutory sanction to the rules of the common law on the subject.

## II. Persons Exempt from the Jurisdiction.

**1. The Crown**, with all persons acting under its authority, is exempt from the jurisdiction of the Sheriff Court.[7]

*Exchequer Causes.* — In 1856 the whole jurisdiction of the Court of Exchequer, which was constituted at the Union by 6 Anne, c. 26, was transferred to the Court of Session, which now exercises exclusive jurisdiction in all matters pertaining to the Exchequer in

[1] Steel *v.* Steel, 1898, 25 R. 715, *per* Ld. MacLaren.

[2] Gordon *v.* Bruce & Co., 1897, 24 R. 844.

[3] Craig *v.* Duffy & Co., 6 Bell's Ap. 308.

[4] Dudgeon *v.* Thomson, 1854, 1 Macq. 714.

[5] White *v.* D. of Buccleuch, 1866, 1 L.R.Sc.Ap. 70.

[6] Dykes *v.* Merry & Cuninghame, 1869, 7 M. 603.

[7] Somerville *v.* Ld. Adv., 1893, 20 R. 1050; Mags. of Helensburgh *v.* Brock, 1905, 13 S.L.T. 98 (O.H.).

Scotland.[1] In the event of any action concerning the Royal revenues being raised or threatened to be raised in the Sheriff Court, the Crown has the privilege of applying to the Court of Session, as the Court of Exchequer, for interdict against such action or proceeding, so as to compel the action to be brought in the Court of Exchequer.[2] Wherever, therefore, a question is raised in the Sheriff Court which concerns the Royal revenues, or any person under Royal authority discharging duties connected with the Royal revenues, either directly as in the case of the levy or recovery of a tax, or indirectly as in the case of actions for damages against revenue officers for alleged illegal seizures, suspensions and liberations from imprisonment for such taxes,[3] the Crown has the right of applying to the Court of Session for interdict. But it would appear that if the Crown do not choose to exercise this privilege, such actions might competently be determined in the Sheriff Court. But the privilege cannot be taken advantage of by individuals who happen to occupy Crown property,[4] in resisting a demand for local rates or by a cautioner for a revenue official in resisting an action on the bond.[5]

**2. Judges of Inferior Courts,** in the discharge of their official or administrative duties, statutory or at common law, are exempt from the jurisdiction of the Sheriff. Thus the execution of an order by a judge of the Police Court of a burgh, given in the exercise of statutory, though not judicial, power, cannot be interdicted in the Sheriff Court.[6] Nor can an arbiter, who exercises quasi-judicial functions, be compelled to give his decree on the question submitted to him, except by the Supreme Court.[7]

**3. Town and County Councils and other Corporations.**—All such bodies are subject to the jurisdiction of the Sheriff like ordinary persons. But so long as they confine themselves to the exercise of the powers, judicial or administrative, conferred upon them by statute or at common law, review or interference by the

[1] 19 & 20 Vict. c. 56, Court of Exchequer Act, 1856.

[2] *Ibid.* s. 14.

[3] *See* Roy *v.* Young & Wilson, 1824, 2 S. 600; Pool *v.* Irving, 1831, 10 S. 152; Ld. Adv. *v.* Hogarth, 1859, 21 D. 213; Ld. Adv. *v.* Fleming, 1864, 2 M. 1032; Sharpe *v.* M'Leod, 1866, 23 D. 1015; Ld. Adv. *v.* Beattie, 1866, 18 D. 380.

[4] Ld. Adv. *v.* Beattie, *sup.*

[5] Postmaster-Gen. *v.* Kerr, 8th July 1813, F.C.; Kinloch *v.* Macintosh 1822, 1 S. 457.

[6] Buchanan *v.* Keating, 1854, 17 D. 155.

[7] Forbes *v.* Underwood, 1886, 13 R. 465, *contradicting* Sinclair *v.* Fraser, 1884, 11 R. 1139.

Sheriff is incompetent.[1] In the administration of the property of which they are the guardians or trustees, or in becoming parties to an action, whether as Pursuers or Defenders, their position is, however, that of any private person. And therefore, if such a body raise an action for the recovery of an assessment imposed, the Sheriff may competently inquire into the legality of the assessment. He does not in such a case act solely in his ministerial capacity, and is therefore not bound to enforce the demand ministerially.[2] When, however, such a body, acting as a rating authority, takes advantage of a statutory provision frequently conferred, and, without raising an action, obtains the Sheriff's warrant for the recovery of rates or assessments imposed, on which a charge may be given, the function of the Sheriff is purely ministerial, and interference is excluded. For these reasons, an official of such a body is not precluded from suing in the Sheriff Court for payment of his salarly.[3] Similarly, the magistrates of a burgh are subject to the jurisdiction of the Sheriff in actions between them and a neighbouring proprietor as to his proprietary rights, such as to erect a fence on the banks of a river.[4]

[1] Hunter *v.* Lochgilphead Sch. Bd., 1886, 14 R. 135.

[2] M'Tavish *v.* Cal. Canal Comrs., 1876, 3 R. 412.

[3] Lyall v. Lanark Comrs. of Supply, 1859, 21 D. 1136.

[4] Kintore *v.* Lyon, 1802, M. 7673; Robertson *v.* Panton, 1823, 5 S. 511.

# CHAPTER III

## JURISDICTION WITH REFERENCE TO SUBJECT-MATTER OF ACTION


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**1. Status.**— In all actions which involve the decision of questions of rank or status, the jurisdiction of the Sheriff is excluded, with the exception that, under the provisions of the Act of 1907, in the case of husband and wife, power to decide questions of separation and aliment has been for the first time conferred. But, with that exception, actions relating to status, including actions of declarator of marriage or of nullity of marriage, of legitimation and bastardy, of divorce, of adherence, and other consistorial actions such as declarators of putting to silence, are wholly excluded from the jurisdiction of the Sheriff. While, however, the Sheriff possesses no jurisdiction to decide actual questions of status, he does possess jurisdiction to entertain and decide actions as to rights incident to or depending upon the right of status, where that right itself is not in question. Thus, in an ordinary civil action, the subject of which was the settlement of a pauper, it was held competent for a Sheriff to decide incidentally, and solely for the purposes of the action, whether two persons, not parties to the action, had been previously married. In such a case the decision of the question of the constitution of the marriage is not *res judicata* against any one who is not a party to the action, and the decision in such a case,

arrived at solely for the purpose of deciding a question to which it is incidental, will not in any way establish the fact of marriage.[1] Similarly, in an action as to the right of a claimant to a fund, the action was held competent in the Sheriff Court, though the right of the claimant depended on the proof of a marriage, on the ground that, although a question of status was raised in the action, the decision of the question in dispute could be decided without reference to it.[2]

*Separation and Aliment.*—Prior to the Act of 1907, actions of separation between husband and wife, as involving the decision of a question of status, were incompetent in the Sheriff Court. Actions, therefore, which involved, directly or indirectly, the right of married persons to live legally separate from each other, were competent only in the Court of Session. But the exclusion of the jurisdiction of the Sheriff Court in such cases was not absolute, since, if the question of status was not in dispute, and even sometimes if it were, the Sheriff might entertain actions dealing with interim arrangements rendered necessary by the separation of the spouses. Thus in cases where the fact of marriage was admitted, a wife *de facto* living separate from her husband might competently bring an action in the Sheriff Court concluding for an award of interim aliment, till the rights of parties were ultimately decided by the Supreme Court. In such cases the Sheriff might competently award a sum by way of interim aliment for such a time as would give the pursuer reasonable time within which to raise an action in the Court of Session. Such actions are still competent in the Sheriff Court. But the pursuer could not raise an action for, nor could the Sheriff grant, an award of permanent aliment, or even a series of interim awards tantamount to a permanent award, since his doing so would involve the decision of the right of the parties to live separate, a matter solely within the jurisdiction of the Supreme Court.[3] Accordingly, where the parties were living separate under a voluntary contract of separation, an action by the wife for aliment in the Sheriff Court was held to be competent,[4] as was an action by a wife holding a decree of separation, for the aliment of a child of the marriage born subsequent to the

[1] M'Donald *v.* Mackenzie, 1891, 18 R. 502.

[2] Wright *v.* Sharp, 1880, 7 R. 460.

[3] Smith *v.* Smith, 1874, 1 R. 1010; Rennie *v.* Rennie, 1863, 1 M. 389.

[4] Hood *v.* Hood, 1871, 9 M. 449.

separation.[1] Where, however, the husband and wife were not *de facto* living separate, an action by the wife was held to be incompetent in the Sheriff Court, it being pointed out that her proper remedy was an action of separation and aliment in the Court of Session.[2] Actions of separation and aliment are now, however, competent in the Sheriff Court. But, as will be seen later, there is no ground for supposing that the Act of 1907 has in any way enlarged the jurisdiction of the Sheriff so as to entitle him to grant anything more than an award of interim aliment until such time as the rights of the parties are determined in an appropriate action in the Supreme Court, that Court being still the only one in which such rights can be determined.[3] The Act, however, makes provision that either on cause shown or *ex proprio motu* the Sheriff may at any stage remit an action of separation to the Court of Session.[4]

**2. Aliment.**—In questions of aliment, excluding those in which questions of status as a primary ground of liability are involved, the jurisdiction of the Sheriff is and always has been plenary.[5] Actions of aliment, therefore, between parent and child, as being ordinary actions for debt, are and always have been competent in the Sheriff Court. But where, in order to establish the pursuer's right to claim aliment from the defender, it is necessary in the first place to decide a question of status, the jurisdiction of the Sheriff is entirely excluded. Thus in actions of aliment between parent and child, or husband and wife, where the relationship which is the ground of action is not admitted or denied, the Sheriff has no jurisdiction. So in an action by a wife for aliment, founded upon the fact of an irregular marriage which is denied by the defender, the question whether the pursuer is entitled to aliment depends primarily on the decision of the question whether the parties are *de facto* husband and wife.[6] Since the decision of that question is competent only in the Court of Session, the action for aliment is incompetent in the Sheriff Court. Where, however, the relationship out of which the action of aliment arises is admitted or is attested by a document which is *prima facie* probative, as an extract from

[1] Hay *v.* Hay, 1882, 9 R. 667.

[2] M'Donald *v.* M'Donald, 1875, 2 R. 705; *see also* M'Leod *v.* M'Leod, 1893, 1 S.L.T. 257, 366.

[3] *See* Macdonald *v.* Macdonald, 1908, Sh. Ct. Reps. 271.

[4] Act, s. 5.

[5] 11 Geo. IV. & 1 Will. IV. c. 69, s. 32.

[6] Benson *v.* Benson, 1854, 16 D. 555.

the public records, the Sheriff has jurisdiction. Thus, in an action for aliment by a wife whose marriage to the defender was publicly solemnised, no question of status is involved, since in such an action the defender cannot in the Sheriff Court plead the invalidity of the marriage, and decree in the Sheriff Court is consequently competent.[1] And in an action by a widow against the trustees of her husband's trust-disposition and settlement for aliment, it was held that the action was competent, there being no question of status involved.[2] Similarly, with regard to questions between parent and child, actions for aliment are competent in the Sheriff Court, except where the fact of the paternity is denied.[3] But in actions for the aliment of an illegitimate child, which, strictly speaking, are actions not of aliment but of debt, no question of status is raised, even if the paternity is denied and the award of aliment involves the decision of the question of the paternity, since a bastard has no status.[4] Such actions, therefore, are and always have been competent in the Sheriff Court.

**3. Custody of Children.**—Questions as to the permanent custody of children are competent at common law only in the Court of Session, to whom the application is made in the exercise of its *nobile officium*, the Sheriff possessing only the power to regulate their interim custody pending an application to the Supreme Court.[5] Similarly, the question whether a person has or has not a legal title to the custody of a child, is competent only in the Court of Session, but the Sheriff has power to give the custody to a person whose title is not disputed as against another who possesses no legal title.[6] By the Guardianship of Infants Act, 1886, the law relating to the custody of pupil children was amended, increased powers being given to the mother of lawful (but not bastard[6]) children, and actions brought under its provisions are competent in the Sheriff Court. The Act gave the Sheriff power, on the application of the mother, to make such order as to the custody and right of access to a child as it might think fit. It further provided[7] that in any case where

[1] M'Leod *v.* Telfer, 1820, Hume, 10; Wylie *v.* Hamilton, 8th July 1824, F.C.; Reid *v.* Black, 1814, Hume, 5.

[2] Young *v.* Young's Trs., 1906, 14 S.L.T. 123 (Sh. Ct.).

[3] M'Donald *v.* M'Donald, *sup.*

[4] Hay *v.* Hay, 1882, 9 R. 667; Nixon *v.* Caldwell, 1876, 3 R. (J.C.) 31.

[5] Hood *v.* Hood, *sup.*; Brand *v.* Shaws, 1888, 15 R. 449; Mackenzie *v.* Keillor, 1892, 19 R. 963.

[6] Brand *v.* Shaws, *sup.*

[7] S. 7.

a decree for judicial separation is pronounced, the Court pronouncing such decree might thereby declare the parent, by reason of whose misconduct such decree is made, a person unfit to have the custody of the children of the marriage, if any. Applications for the custody of children might be removed to the Court of Session in the manner provided by Section 9 of the Sheriff Court Act of 1876. The Custody of Children Act, 1891, still further enlarged the powers of the Sheriff, but it did not confer jurisdiction to entertain petitions for the permanent custody of children, or petitions where questions of the desertion of the children by the mother are raised in bar of her right to demand their production.[1] The Act of 1907, which repeals the Sheriff Court Act of 1876, provides that all actions to regulate the custody of children shall be competent in the Sheriff Court, and that such actions shall be removeable to the Court of Session either on cause shown or *ex proprio motu* of the Sheriff.[2] The Act is therefore declaratory of the law previously existing, statutory or other, and limits the jurisdiction of the Sheriff to entertaining actions for regulating the custody of children, all actions relating to their permanent custody being still competent only to the *nobile officium* of the Court of Session. In all applications for the custody of children the interest of the child is the main thing which the Court has to consider, and where, in the opinion of the Court, to give the custody to an erring parent would be prejudicial to the child's best interests, physical or moral, the Court will refuse to grant the application.[3]

**4. Moveables.**—In actions relating to moveable rights or personal property the Sheriff has unlimited jurisdiction. Thus all actions which arise out of mercantile transactions or of contracts with reference to moveables, whether for specific implement or for damages for breach, are competent in the Sheriff Court.

*Damages.*—Among the actions of damages for breach of contract which may be brought in the Sheriff Court, are those for breach of promise of marriage and for reparation in respect of slander and libel, seduction, assault, or injury to person or property, though some of these may be removed to the Court of Session before the merits are entered upon.

[1] Gillon *v.* Barony Parish Council, 1898, 1 F. 183 ; Mackenzie *v.* Keillor, 1892, 19 R. 963.

[2] Act, s. 5.

[3] *See* C. D. *v.* A. B., 1908, S.C. 737.

*Privative Jurisdiction.*—In all actions concerning moveable rights where the value of the subject in dispute, exclusive of interest and expenses, does not exceed £50, the jurisdiction of the Supreme Court is wholly excluded. Such actions must be brought and followed to a conclusion in the Sheriff Court only, and are not subject to review by the Court of Session.[1] But an exception to the exclusion of the jurisdiction of the Supreme Court in actions under the pecuniary limit exists in the case of foreigners resident abroad, and who are therefore not subject to the jurisdiction of the Sheriff, even although such persons be possessed of heritable property in Scotland.[2] But the right of appeal competent under any Act of Parliament in force for the time being is reserved. The limited right of appeal competent under the Small-Debt Act, and those permitted under special statutes, such as the Ecclesiastical Buildings Act of 1868 and the Public Health Act of 1897, do not therefore fall under the operation of the section.

**5. Heritable Rights.**—The jurisdiction of the Sheriff with regard to questions of heritable right and title was at one time co-extensive with that of the Court of Session. The power of the Sheriff Court in such matters had, however, for long fallen into abeyance, until it was revived, though only to a limited extent, by the Sheriff Court Act of 1877. That Act provided that the jurisdiction of the Sheriff Court should extend to all actions, save adjudications (except so far as already competent) and reductions, relating to heritable right and title, where the value of the subject in dispute did not exceed £50 yearly or £1000 in all. Where there was any dispute as to the value of the subject, it was left to the determination of the Sheriff, his determination being final as to the competency of the action in the Sheriff Court. In an action of declarator with reference to the right to fish in a tidal river, some doubt was expressed as to whether the value of the subjects was to be determined by reference to the pursuer's or to the defender's interest.[3] The point was never expressly settled, though the words "value in dispute" might reasonably be assumed to be sufficiently wide to cover both. In the event of the Sheriff finding, in such way as he might think expedient, that the value of the subject exceeded

[1] Act, s. 7.

[2] Strachan *v.* Pharmaceutical Socy. of Great Britain, 1901, 8 S.L.T. 373 (O.H.).

[3] Bowie *v.* M. of Ailsa, 1887, 14 R. 649.

the statutory amount, it was in his discretion either to dismiss the action, or, on the motion of the pursuer, to transmit it to the Court of Session. But in all cases it was within the defender's right, at any time before or within six days after an interlocutor closing the record was pronounced, to lodge a note praying for the transmission of the cause to the Court of Session. All actions brought under the provisions of the Act required to be raised in the Sheriff Court of the county in which the property in dispute was situated, and all parties against whom the action was directed were subject to the jurisdiction of that Court. Among actions which have been held to be competent under the provisions of the Act may be mentioned a declarator with reference to the right of fishing,[1] and a claim for a sum of money due by one of two adjoining proprietors in respect of the construction of a mutual gable;[2] but the competency of an action of declarator and for payment of a casualty has been doubted.[3]

The Act of 1907, while substantially repeating the provisions of the Act of 1877, introduces some modifications and extensions of the jurisdiction of the Sheriff in entertaining actions relating to heritable rights, the most notable of which is that the pecuniary limitation of the value of the subject in dispute is removed. The Act provides that all actions relating to questions of heritable right or title, except actions of adjudication (save in so far as already competent) and of reduction, and including actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant, whatever be the value of the subject in dispute, may be competently raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated, and that all parties against whom any such action is brought shall be subject to the jurisdiction. While the Act of 1877 provided that actions in which the value of the property in dispute exceeded a certain limit in value, could not competently be raised in the Sheriff Court, the Act of 1907 provides that where in an action raised in the Sheriff Court the value of the subject in dispute exceeds £50 yearly or £1000 in all, it shall be competent to either party at the closing of the record, or within six days thereafter, to require the cause to be remitted to the Court of Session. An action relating to

[1] Bowie *v.* M. Ailsa, *sup.*

[2] Stark's Trs. *v.* Cooper's Trs., 1900, 2 F. 1257.

[3] Motherwell *v.* Manwell, 1903, 5 F. 619; *see* Clark *v.* Law, 1887, 3 S.C.R. 360.

a question of heritable right or title, whatever be the value of the subject in dispute, may now, therefore, be competently initiated, and, if neither party object, followed to a conclusion in the Sheriff Court.

*Interim Possession.*—The Sheriff formerly possessed, and still possesses where necessary, the power of regulating interim possession of heritable subjects where the question of title is not in dispute. Prior to the Act of 1907, the power of the Sheriff in regard to questions of heritable title was not, as now, unlimited, and in disputes with regard to heritable title which were incompetent, in respect of the value in dispute, in the Sheriff Court, the power of the Sheriff was confined to regulating the interim possession of the subjects. Such judgments were known as possessory judgments, and were founded mainly upon the state of possession upon a written title, or in the case of a public right, such as that of right of way, without written title, as it had existed for the preceding seven years, which state the Sheriff might protect from interruption, or, if disputed, might regulate, pending the ultimate decision of the question of title in the Court of Session. Where the right of possession of, as well as that of the actual property in, the subjects was the subject of an action in the Court of Session, the jurisdiction of the Sheriff to regulate the interim possession was excluded. Where no question of title was involved, as in actions relating to contracts with reference to heritable estate, including feus, leases, or mandates to purchase land, or as in actions between a person having a title and one having none, actions relating to heritage were competent in the Sheriff Court.[1] As, however, the Sheriff's powers in actions relating to heritable right and title are now co-extensive with those of the Court of Session, the necessity for possessory judgments in the Sheriff Court has largely if not altogether disappeared.

*Feu-duties.*—Where no question of heritable right was raised, the Sheriff had, prior to the Act of 1907, jurisdiction in actions for payment of feu-duties and other sums in respect of the occupation of heritable property. But where any question of heritable title was raised, the Sheriff had jurisdiction only when the value of the subjects in dispute did not exceed the pecuniary limit sanctioned by the Act of 1877, namely, £50 yearly or £1000 in all. In actions of

[1] *See* Mackay's Prac., for cases dealing with the subject.

removing *ob non solutum canonem*, the jurisdiction of the Sheriff was, by the Sheriff Court Act of 1853, limited to actions where the subject did not exceed £25 in yearly value, and the feu-duties were in arrears for two years. The vassal might, however, within a year of removal, raise an action of declarator in the Court of Session for vindication of the subject on any ground proceeding on a challenge of the superior's title. Other irritances *ob non solutum canonem* were competent in the Sheriff Court only when the value of the subjects fell within the scope of the Act of 1877. The Act of 1907, by its provisions regarding actions relating to questions of heritable right and title, irrespective of the value of the subjects, and actions of declarator of irritancy, has made all actions with reference to feu-duty and other sums due in respect of the occupation of land competent in the Sheriff Court.

*Leases and Rents* are now, and were prior to 1907, in the same position as feu-duties. Thus, under the Act of 1907, not only has the Sheriff jurisdiction in actions as to the true import of leases, as, for example, their duration,[1] and of those to enforce the legal obligations incurred under them,[2] or the duty of leaving the premises in proper order,[3] but he may competently entertain all actions which raise any questions of lease between landlord and tenant, whether a question of title be involved or not. Thus actions to have a tenant ordained to stock a farm,[4] to furnish a shop,[5] or to plenish a house,[6] are each competent in the Sheriff Court. So, with regard to rent, he may not only sequestrate for non-payment (such actions being competent only in the Sheriff Court),[7] and decide questions as to the tenant's liability, the amount of rent and the deductions to be made from it, and interfere during the currency of a lease to protect property in danger of injury owing to the tenant's absence or desertion, by the appointment of a judicial factor,[8] but he may competently decide all questions between landlord and tenant arising out of the occupation of heritable property.[9]

[1] Robertson *v.* Cockburn, 1875, 3 R. 21.

[2] Horn *v.* M'Lean, 1830, 8 S. 329. Wright *v.* Wightman, 1875, 3 R. 68.

[3] Dickson *v.* Graham, 1877, 4 R. 717; Gordon *v.* Melrose, 1870, 8 M. 906.

[4] M'Dougall *v.* Buchanan, 1867, 6 M. 120.

[5] Macdonald *v.* Mackessack, 1888, 16 R. 168.

[6] Wright *v.* Wightman, *sup.*

[7] Duncan *v.* Lodijenskey, 1904, 6 F. 408.

[8] Gibson *v.* Clark, 1895, 23 R. 294.

[9] *See* Mags. of Kilmarnock *v.* Reid, 1897, 24 R. 388; Sutherland *v.* Squair, 1898, 25 R. 656.

*Nuisance and Servitude.*—By the Sheriff Court Act of 1838, the jurisdiction of the Sheriff was extended to all actions or proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or prædial servitudes, whether in such actions questions of heritable title were involved or not.[1] This clause of the Act of 1838 is repealed by the Act of 1907, which, however, confers anew upon the Sheriff the same powers with regard to questions of nuisance and servitude as he possesses with regard to all other questions relating to heritable rights.

*Division of Common Property.*—In actions of division of commonty, of division, and of division and sale of common property, the jurisdiction of the Sheriff was, under the Act of 1877, limited to cases where the value of the subjects did not exceed £50 yearly or £1000 in all. By the Act of 1907 the jurisdiction of the Sheriff is made co-extensive with that of the Court of Session. Such actions, if raised in the Sheriff Court, must be brought in the district of the county where the subjects are situated, and if the value of the subjects exceeds £50 yearly or £1000 in all, may, on the motion of either party, at the closing of the record or within six days thereafter, be removed to the Court of Session.

*Other actions relating to Heritable Right.*—The Sheriff possesses further jurisdiction in actions relating to heritable right, such as those of maills and duties and poinding of the ground, of adjudication, and adjudication in implement, of the regulation of marches,[2] and in certain proceedings in connection with entails, which is treated of in the section dealing with special forms of action competent in the Sheriff Court.

**6. Succession.**—The jurisdiction of the Sheriff, in addition to that which he exercises in matters of succession in the ordinary forms of action, extends under various special acts to questions of the service of heirs, of the appointment and confirmation of executors, and of the making up of a legal title in heritable or moveable succession. The Act of 1907 provides that actions relating to succession to move-

[1] 1 & 2 Vict. c. 119, s. 15. *See* Brown *v.* Currie, 1843, 5 D. 463; Thomson *v.* Murdoch, 1862, 24 D. 975; Gow's Trs. *v.* Mealls, 1875, 2 R. 729.

[2] Strang *v.* Stewart, 1864, 2 M. 1015; 4 M. (H.L.) 5. Paterson *v.* Macdonald, 1880, 7 R. 958. E. of Kintore *v.* Kintore's Trs., 1886, 13 R. 997. Actions for the reconstruction of march fences and for altering the line of march are competent only in the Sheriff Court.

ables, where the value of the subject in dispute exceeds £1000, may, on the motion of either party at the closing of the record or within six days thereafter, be removed to the Court of Session.

**7. In various special Matters.**—The Sheriff has a wide jurisdiction in maritime cases; in bankruptcy and insolvency; in the appointment of judicial factors; in questions of relief under the Poor Law and Lunacy Acts; in proceedings in regard to heritable securities under the Heritable Securities Act, 1894; with reference to churches, manses, etc., under the Ecclesiastical Buildings Act, 1868; with reference to lands compulsorily taken under the Lands Clauses Consolidation Act, 1845; and with reference to the presumption of death of persons who have disappeared for seven years, under the Presumption of Life Limitation Act, 1891. He has also jurisdiction in cases craving for the appointment of an arbiter where there has been an agreement to refer, but the arbiters have not been named; in actions craving for appointment of an oversman in cases where the arbiters fail to agree in the nomination of one, under the Arbitration (Scotland) Act, 1894; and in arbitrations under the Workmen's Compensation Act, 1906. Under the Agricultural Holdings Act, 1900, and relative Act of Sederunt of 11th June 1901, an arbiter under the Act may obtain the opinion of the Sheriff on questions of law by stated case. Further, in estates not exceeding £10,000, there is, under the Finance Act, 1894 and 1896, and Act of Sederunt of 17th July 1895, an appeal to the Sheriff from the decision of the Commissioners of Inland Revenue. His jurisdiction with reference to each of these matters, except that of bankruptcy and insolvency, which is outside the scope of the volume, is treated of later in the section dealing with these special forms of action.

# CHAPTER IV

## JURISDICTION WITH REFERENCE TO THE REMEDY SOUGHT

### FORMS OF ACTION


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### I. Generally

In any action in the Sheriff Court, it is necessary, not only that the defender shall be subject to the jurisdiction of the Court before whom he is convened, and that the subject-matter of the action be such as the Sheriff is competent to deal with, but also that the remedy by which the pursuer seeks to enforce his right shall be such as may be within the Sheriff's power to grant. Generally speaking, when the two former conditions are complied with, the Sheriff may competently grant the remedy required. But by usage certain forms of action have been appropriated solely to cases originating in the Court of Session, and in such cases the forms by which the pursuer seeks to enforce his right are wholly excluded from the jurisdiction of the Sheriff Court.

### II. Petitory Actions

**Petitory Actions** are those in which the claim or demand of the pursuer is that the defender may be ordained (*a*) to make

payment of a certain sum of money, or of such sum as may on a just accounting be found due by him; (*b*) to do or be restrained from doing a specified act, or from insisting in a specified course of action or conduct; or (*c*) to implement a specific contract or obligation. With regard to all such actions the Sheriff has the most ample jurisdiction.

**Payment of Money.**—Actions for payment of money, which are competent in the Sheriff Court without restriction as to pecuniary limit, may conclude for payment immediately or at a future time, or in one sum or by instalments. In actions of damages arising out of a single breach of contract, the whole damage, though future, must be concluded for in a single action. Successive actions are, however, competent where there are successive breaches of contract.[1]

**Count and Reckoning.**—In such actions the pursuer concludes against the defender for production of all accounts between them, and for payment of the balance due or to be found due on these accounts, with generally, though not necessarily, an alternative conclusion for the payment of a specified sum in the event of the defender's failing to produce the accounts demanded. This alternative conclusion if omitted may, generally on payment of expenses, be supplied by amendment.[2] Such actions, at least in their initial stages, are obviously actions *ad facta præstanda.*

**Interdicts** are actions by which it is sought to prohibit or prevent a person doing or continuing to do some particular act, or from insisting in a specified course of conduct or action. Provided the act complained of is illegal or wrongful, that the complainer has sufficient title or interest to object to its commission, and that the interdict craved is in its nature legally competent, there is practically no limit in such cases to the jurisdiction of the Sheriff. When the action relates to the prevention of the exercise of a heritable right, it must be brought within the Sheriffdom where the wrongful or illegal act is sought to be prevented, since the Sheriff of one county has no jurisdiction to grant interdict against parties resident in another county in respect of an illegal act (such as the illegal use by them of salmon fishing) in another county.[3]

[1] Stevenson *v.* Pontifex & Wood, 1887, 15 R. 225.

[2] Dobson *v.* Hughson, 1858, 20 D. 610.

[3] Home Drummond *v.* Thomson, 1907, 15 S.L.T. 524 (Sh. Ct.).

Interdict, which is an ordinary process, is often concluded for by itself, but sometimes in conjunction with declaratory or rescissory conclusions in an ordinary action, or (in the Court of Session) with a prayer for suspension in the summary process of suspension and interdict. In certain circumstances, declarator rather than interdict may be the proper form of action.[1]

**Suspension** is the process whereby the injury of rights is prevented, as distinguished from the remedies where such injury has been already accomplished. Combined with the process of interdict, suspension is used to stay execution at a stage when simple suspension is no longer competent. Under the provisions of the Act of 1907, suspensions of charges or threatened charges upon decrees of Court granted, or upon decrees of registration proceeding upon bonds, bills, contracts, or other obligations registered in the books of the Sheriff Court or of Council and Session, or any others competent, can be competently brought in the Sheriff Court only if the value of the debt, exclusive of interest and expenses, does not exceed £50.

*Ad factum præstandum.*—Such actions are those in which the pursuer seeks to have the defender ordained to do a certain act or to implement a specific obligation or contract, as, for example, to sign a particular deed, which may now competently refer to heritage (though prior to the Act of 1907 it was so competent only if no question of heritable right or title were involved);[2] to implement a specific contract according to its terms;[3] to deliver up bills or other documents wrongfully withheld;[4] or to consign a sum of money.[5] A breach of contract, as, for example, for the sale and delivery of a specific subject, gives the party aggrieved the right to sue for implement of the contract, and although he may elect to do so, he cannot be compelled to resort to the alternative of damages, unless implement can be shown to be impossible (the onus of proving which lies upon the party in breach), in which case the maxim *loco facti subit damnum et interesse* applies.[6] Where, how-

[1] *See* Cronin *v.* Sutherland, 1899, 2 F. 217.

[2] Corbet *v.* Douglas, 1808, Hume, 346; E. of Aberdeen *v.* Laird, 1822, 1 S. 273; Cox *v.* Kerr, 1873, 1 R. 60; Anderson *v.* Fraser, 1871, 43 Jur. 508.

[3] E. of Moray *v.* Pearson, 1842, 4 D. 1411; Middleton *v.* Leslie, 1892, 29 S.L.R. 65; Graham *v.* Mags. of Kirkcaldy, 1882, 9 R. (H.L.) 91.

[4] Riddell *v.* Christie, 1821, 1 S. 160.

[5] M'Kenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147.

[6] Stewart *v.* Kennedy, 1890, 17 R. (H.L.) 1, *per* Ld. Watson.

ever, specific implement is shown to be, or has through mere lapse of time become, impossible, the Court will not entertain an action concluding only for specific performance. The pursuer's remedy in such a case is not to seek for implement, but to sue for damages.[1] In England a different rule appears to prevail, the only legal right arising from a breach of contract being a claim for damages, specific performance being not a matter of legal right, but a purely equitable remedy, which the Court may withhold where there are sufficient reasons either of conscience or expediency against it.[2] Unless, therefore, it is reasonably certain that specific implement of his contract or obligation is capable of performance by the defender, an action *ad factum præstandum* should always alternatively crave for damages. Actions *ad facta præstanda*, even if the value of the cause be above £20 and below £50, are not, under the provisions of the Act of 1907, summary causes, though even if they exceed £50 in value they may be so treated if the parties consent to that course.[3] But such actions, where the value of the cause is not disclosed, are deemed to exceed £50, unless in the course of the cause the Sheriff determines, as after provided, that the value is less than £50. An arbiter, though a person voluntarily and for a stipulated remuneration undertaking to perform a specific contract, occupies, nevertheless, a position in many respects analogous to that of a Judge in one of the Inferior Courts, and therefore can be compelled only by an action in the Supreme Court[4] to implement his contract by giving his award.

### III. Possessory Actions

Possessory actions are those in which the question in dispute relates solely to the possession of heritable subjects, and not to the title itself. In such actions the object of the pursuer is to attain,

[1] Cocker *v.* Crombie, 1893, 20 R. 954; *see also* Moore *v.* Paterson, 1881, 9 R. 337; Graham *v.* Mags. of Kirkcaldy, 1882, 9 R. (H.L.) 91; Winans *v.* Mackenzie, 1883, 10 R. 941.

[2] *See* Stewart *v.* Kennedy, *sup.*

[3] Act, s. 3, i. (1, 2).

[4] Sinclair *v.* Fraser, 1884, 11 R. 1139, decided by the Second Division, affirmed the power of the Sheriff to compel an arbiter to issue his award; Forbes *v.* Underwood, 1886, 13 R. 465, decided by the First Division, affirmed the contrary. According to the recognised rule, where two decisions of equal authority differ in their interpretation of the law, that must be followed which is later in date. The ultimate decision of the question is still theoretically open.

retain, or recover possession of certain heritable subjects, or to be found entitled to payment of their rents. Such actions are therefore grounded not upon absolute right, but upon the fact of possession, for which, as regards heritable subjects, seven years' possession on a written title suffices.[1] The fact of possession on a written title for seven years without interruption gives the possessor right to a possessory judgment, the effect of which is to prevent any one alleging a preferable title to the subjects from claiming possession of them, until by an action of declarator or reduction in the Supreme Court his own right is established, or that of the possessor is declared null. Such actions, therefore, usually take the form of interdict, which may be founded as well upon absolute right as upon the fact of possession, in which, by pronouncing interim interdict, the Sheriff preserves the *status quo* pending final decision, and by declaring the interdict perpetual, decides upon a consideration of the possession during the previous seven years, what possession is to be maintained thereafter, till the actual question of title, if in dispute, is decided by declarator or reduction in the Court of Session. Besides interdicts, the only possessory actions in common use are those of removing and of maills and duties, by the former of which the possession, and by the latter the rents, of lands are recovered from the possessor by one who, without proving his absolute right, can establish a *prima facie* title, as, for example, where he has himself granted the lease, or has for seven years been in possession of the subjects upon a written title.

Prior to the Act of 1907, actions relating to questions of heritable right or title, including actions of declarator, where the value of the subjects exceeded £50 by the year or £1000 in all, and actions of reduction, were incompetent in the Sheriff Court. Actions of reduction are still incompetent in the Sheriff Court, but any other action relating to a question of heritable right or title, including actions of declarator, is under the provisions of that Act now competent in the Sheriff Court. Possessory actions need therefore be resorted to in the Sheriff Court now only where the decision of the actual right or title to the subjects in dispute requires to be vindicated through an action of reduction in the Court of Session.

[1] Stair, ii. 7, 22, and iv. 22, 5; Ersk. iv. i. 49, 50.

### IV. Declaratory Actions

In such actions the existence of a right, or the facts upon which such right depends, if disputed or denied, are declared. The Court will not, however, pronounce a declaratory judgment except upon facts which disclose a right, present, future, or contingent, violation of which is actually threatened, which the pursuer has an interest to establish and the defender a corresponding interest to deny. Even where a right exists, the Court will not declare it if there is no dispute.[1] Declaratory actions are usually accompanied by petitory, possessory, or prohibitory conclusions. The jurisdiction of the Sheriff in such actions is purely the creation of statute, and until the passing of the Act of 1907 was confined to cases in which the value of the subject in dispute did not exceed, in the case of moveables, £1000, or, in the case of heritage, £50 yearly or £1000 in all.[2] Now, however, all actions of declarator (with the exception of those of marriage or of nullity of marriage, and actions the direct or main object of which is to determine the personal status of individuals) are competent in the Sheriff Court.[3] The competency in the Sheriff Court of an action of declarator and for payment of a casualty under the Conveyancing Act of 1874, has, however, been doubted.[4] Prior to the passing of the Act of 1907, the Sheriff had no jurisdiction to entertain any action in which a question of personal status was raised, though he might competently entertain and decide actions in which questions of status were involved, provided the decision on the question of status were merely ancillary or incidental to the main question in dispute. The Act, therefore, as regards declarators, so far as they indirectly involve questions of status, is declaratory of the previously existing law.

**Proving the Tenor** of a deed or other writing accidentally or wrongfully lost, destroyed, cancelled, or obliterated, whereby its contents are restored, and the restored copy held to have the same

[1] Lyle *v.* Balfour, 1830, 9 S. 22; E. of Galloway *v.* Garlies, 1838, 16 S. 1213; Harvey *v.* Harvey's Trs., 1860, 22 D. 1310; Mags. of Edinburgh *v.* Warrender, 1863, 1 M. 887, *per* Ld. Neaves; Fleming *v.* M'Lagan, 1879, 6 R. 589; Chaplin's Trs. *v.* Hoile, 1890, 18 R. 27; Falconer Stewart *v.* Wilkies, 1892, 29 S.L.R. 534.

[2] Sheriff Court Act, 1877, s. 8.

[3] Act, s. 5 (1).

[4] Motherwell *v.* Manwell, 1903, 5 F. 619; *see* Fife Coal Co. *v.* Bernard's Trs., 1907, S.C. 494; Trades Maiden Hospital *v.* Mackersy, 1907, S.C. 73.

effect as the original, is a species of declarator, the jurisdiction in regard to which has hitherto been confined to the Supreme Court. Such actions are, however, not truly declarators, though they are essentially declaratory in effect, and it may therefore perhaps be open to doubt whether they are yet competent in the Sheriff Court. The language of the Act seems, however, sufficiently comprehensive to confer jurisdiction on the Sheriff Court in all such actions. Under the provisions of the Act of 1877, there did not appear to be anything which could render an action of proving the tenor of a deed relating to heritage, or to the property in or right of succession to moveables, where the value of the subjects was within the statutory limit, incompetent in the Sheriff Court. But in all cases in which the value of the subjects exceeded that limit, and in all cases of declarator not falling within the two specified categories, the action was competent only in the Supreme Court. Since an action of proving the tenor must necessarily precede a petitory action founded on the deed itself, the result, prior to the Act of 1907, was to render incompetent in the Sheriff Court any action founded on a deed lost, cancelled, or destroyed, with the exception of deeds falling under the two classes specified in the Act of 1877; though it did not necessarily follow that an action founded, not on the deed, but on the consideration in respect of which the deed was granted, was equally incompetent. Now, however, it would appear (though, in the absence of authoritative decision, it cannot be affirmed) that all actions of proving the tenor may competently be raised in the Sheriff Court, though, if they raise questions of heritable right or title, or of the right of succession to moveables, they may, on the motion of either party at the closing of the record or within six days thereafter, be removed to the Court of Session, provided in the one case the value of the subject in dispute exceeds £50 yearly, or £1000 in all, or in the other exceeds £1000.

**Division.**—Since 1877 three actions of division have been competent in the Sheriff Court. These are the actions of division of a commonty, of division, and of division and sale, relating to heritage. Under the Act of 1877, such actions were competent in the Sheriff Court only where the value of the subject in dispute did not exceed £50 by the year or £1000 in all. By the Act of 1907, all such actions may competently be raised in the Sheriff Court, no matter what the value of the subjects in dispute may be, provided

they are raised in the district of the Court in which the property sought to be divided is situated. But all such actions may, at the closing of the record or within six days thereafter, be competently removed to the Court of Session on the motion of either party, where the value of the subject in dispute exceeds the limit sanctioned by the Act of 1877.

**Multiplepoinding** is the action by which is determined the right to anything, whether consisting of heritage, goods, or money, usually called the fund *in medio*, which is in the possession of one person and is the subject of competing claims. As the foundation of the action is the existence of two or more adverse claimants to the same fund, it is competent to any one who is the subject of double distress, that is, of competing claims to a subject of which he is in possession. But the fund *in medio* must be wholly, and not merely partially, subject to such competing claims actually made or capable of being made against it; or at least it must be the subject of conflicting interests, although the actual claims in respect of them have not been advanced,[1] and it must be capable of being placed actually or constructively in the custody of the Court, and of being made available for immediate transference, division, or distribution on the conclusion of the action.[2] The holder of the fund is the pursuer and raiser of the action[3]—the real raiser, if the object of the action is to have the property in the fund determined and himself exonerated; the nominal raiser, if the action be raised in his name by a competing claimant. The defenders are all those who have or may have claims on the subject in dispute. The action is incompetent where another and simpler remedy is possible; it cannot therefore be resorted to as a means of constituting a disputed debt, in place of an action of count and reckoning,[4] of a suspension,[5] or of proceedings under the Bankruptcy Acts for winding up insolvent estates.[6] The subject-matter of the fund commonly consists of moveable or personal property, corporeal or incorporeal; and though the opinion of a high authority has been expressed to the effect that land or other heritable subjects cannot in themselves

[1] Clydesdale Bank *v.* Russel & Johnstone, 1859, 21 D. 886; Winchester *v.* Hockey, 1890, 17 R. 1046; Miller *v.* Ure, 1838, 16 S. 1204; Macnab *v.* Waddell, 1894, 21 R. 827.

[2] Nimmo *v.* Murray, 1863, 1 M. 791.

[3] Kelland *v.* Douglas, 1863, 2 M. 150.

[4] Park *v.* Mackersy, 1843, 5 D. 482.

[5] Moncreif *v.* Bethune, 1844, 6 D. 1100.

[6] Kyd *v.* Waterson, 1880, 7 R. 884; Robb's Trs. *v.* Robb, 1880, 7 R. 1049.

properly be made the subject of the action, only the right to demand a conveyance of, or the rents due from, heritable subjects being properly the subject of competition in such a process,[1] there does not appear to be any inherent reason why heritable subjects should not form the subject of a multiplepoinding. It has, indeed, been expressly decided (in the Outer House) that the process is a proper and competent one in which to try questions of title to heritage.[2] So far as the right to moveables is concerned, there is no limit to the jurisdiction of the Sheriff. By the Act of 1877 the jurisdiction of the Sheriff was extended to include all actions (including actions of declarator, but excluding actions of adjudication, save in so far as they were then competent, and excluding actions of reduction) relating to a question of heritable right or title where the value of the subject in dispute did not exceed £50 by the year or £1000 in all. The recent Act, however, provides that all actions, without distinction, relating to questions of heritable right or title (except actions of adjudication save in so far as now competent and actions of reduction), including all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal, or of a landlord against a tenant, are competent in the Sheriff Court. But all actions relating to questions of heritable right or title, if raised in the Sheriff Court, must be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated.[3] And in regard to actions of multiplepoinding, it is provided that the action may be raised either in the Sheriffdom where the *fund in medio* is situated, or in that to whose jurisdiction the holder of the fund is subject.[4]

## V. Actions of Reduction

Actions of reduction, or those in which it is sought to reduce, set aside, and annul a document or other writing which confers or purports to confer a right adverse to that of the petitioner, are, and always have been, incompetent in the Sheriff Court. At common

[1] *See* Mackay's Practice, *and see* Baillie *v.* Baillie, 1830, 8 S. 318; Campbell *v.* E. of Crawford, 1783, M. 3973; Pentland *v.* Royal Exch. Ins. Co., 1830, 9 S. 164.

[2] Edin. Merch. Maiden Hospital *v.* Greig's Exrs., 1902, 10 S.L.T. 207 (O.H.); Boyd's Trs. *v.* Boyd, 1906, 13 S.L.T. 878 (O.H.).

[3] Act, s. 5 (4).

[4] Act, Rule 128.

law, actions involving reductory conclusions, such as the right of a person to be freed from the terms of a written contract,[1] or from the laws of a society or corporation of which he is a member,[2] were considered to deal with subjects too serious and far-reaching in their consequences for the jurisdiction of any but the Supreme Court. Consequently, at one time the fact that an action even involved the reduction of a deed or other writing was sufficient to prevent the action being entertained by the Sheriff, who was obliged to sist it pending an action of reduction in the Court of Session.[3]

The first important exception to the rule was effected by the provisions of the Bankruptcy Act of 1856 (as amended by the Bankruptcy Act of 1857), which provided that deeds made void by the Act and alienations of property which are voidable by statute or at common law, might be set aside in the Sheriff Court either by way of action or exception, a decree setting aside a deed by exception having the same effect as regards the person objecting to the deed as if decree had been given in an action at his instance.[4] These provisions, however, while they obviate the necessity for actions of reduction, do not have the effect of making actions of reduction in the Sheriff Court competent. Their only effect is that when the validity of such a deed is questioned in any action in the Sheriff Court, its validity may be determined solely for the purposes of that action. Therefore, when an action concludes merely for reduction of such a deed in the Sheriff Court, it will be dismissed, though if the action contains conclusions which are otherwise competent, the mere introduction of reductive conclusions will not render the action wholly incompetent, and it will then be dismissed only *quoad* the reductive conclusions, and sustained *quoad* those competent.[5] But since no decree of reduction can follow, the introduction of reductive conclusions in a Sheriff Court action is inadvisable.

The second important exception was introduced by section 11 of the Act of 1877, which provided that when in any action competent in the Sheriff Court a deed or writing was founded upon by either party, all objections to it might be stated and maintained by way of

[1] Young *v.* Roberton, 1830, 9 S. 59.

[2] Fleshers of Glasgow *v.* Watson, 1824, 3 S. 305; Porteous *v.* The Cordiners of Glasgow, 1830, 8 S. 908.

[3] M'Laren *v.* Steele, 1857, 20 D. 48.

[4] 19 & 20 Vict. c. 70, s. 10; 20 & 21 Vict. c. 19, s. 9.

[5] Dickson *v.* Murray, 1866, 4 M. 797; Moroney *v.* Muir, 1867, 6 M. 7; Nivison *v.* Howat, 1883, 11 R. 189; Brown's Trs. *v.* Fraser, 1870, 8 M. 820.

exception, without the necessity of bringing a reduction, provided that if any objection to a liquid document of debt, maintainable only by way of reduction, was maintained by way of exception, the objector should find caution or make consignation as the Sheriff might direct. An objection is stated by way of exception when it is stated by way of reply. Thus, where the pursuer in an action founds upon a deed, the defender may maintain by way of exception that the deed was granted or obtained by means of fraud. And similarly the pursuer may take exception to any deed which is produced and founded on by the defender, as for instance a receipt.[1] But to prevent such pleas being taken for the mere purpose of creating delay, the Sheriff had power to direct any one objecting by way of exception to a liquid document of debt, to find such caution or to consign such sum as he might ordain.[2]

The Act of 1907 substantially, and with some slight modification, re-enacts the provisions of the Act of 1877. It provides, in terms so far identical with those of the earlier Act, that documents may be challenged by either party *ope exceptionis*, but that the Sheriff may, on an objection being so stated where an action of reduction would be competent, order the objector to find caution or to make consignation as he shall direct.[3] The discretion of the Sheriff to make such orders is therefore no longer confined to cases where the objection refers solely to a liquid document of debt, and he may now, therefore, in all cases where the plea is taken, whether with a view to delay or otherwise, order the objector to find caution or consign.

### VI. Special Actions Competent

Generally, where the subject-matter of an action is such that the Sheriff may competently deal with it, he has power to give the remedy sought with regard ro it.

**Heritage.**—The special actions relating to the recovery of

[1] *See* Mackie *v.* Strahan, Kinmond, & Co., 1896, 23 R. 1030.

[2] Sh. Ct. Act, 1877, s. 11; as to the kind of deeds which fall under the operation of the statute, *see* Nivison *v.* Howat, 1883, 11 R. 189; Scott *v.* Cook, 1886, 24 S.L.R. 34; Wilson *v.* Glasgow Tram. Co., 1878, 5 R. 981; Neil, 1901, 3 F. (J.C.) 85, and the following Sheriff Court decisions: Roberts *v.* Fettes, 1901, 10 S.L.T. 208, 18 S.L.Rev. 290; Dunbar *v.* Dempster, 1892, 8 S.L.Rev. 332; M'Lauchlan & Co. *v.* Morrison, 1902, 18 S.L.Rev. 206.

[3] Act, Rules 50, 51.

rents, feu-duties, and casualties, maills and duties, poinding of the ground, regulation of marches, and adjudications, have been already dealt with.

**Constitution.**—Actions of constitution are properly actions for the payment of debt, but the term is used specially with reference to those actions which are required to found a title in the person of a creditor in the event of the death either of the debtor or the original creditor.[1] Thus, where a debtor dies, the creditor, before he can by diligence attach the debtor's moveable or heritable estate, must first constitute his debt against the debtor's heir, unless that heir voluntarily chooses to renew his ancestor's obligation, or unless he renounces the succession, in which case a decree of cognition is pronounced. In virtue of a decree *cognitionis causa*, the creditor may proceed to adjudge the heritage of his deceased debtor.

**Exhibition.**—Actions of exhibition are those by which the production or delivery of writings is compelled, and are therefore a form of action *ad factum præstandum*. Where the action is for the exhibition of a document in order that it may be examined, the Court will ordain it to be exhibited in the hands of the Sheriff Clerk.[2] The action was formerly competent in the Sheriff Court, if the deed related to heritage, only when the pleas raised no question of heritable title.[3] As, however, under the provisions of the Act of 1907, all actions relating to questions of heritable title are competent in the Sheriff Court, there would appear to be no restriction in the kind of deed exhibition of which may be called for.

**Furthcoming** is the action by which an arrested fund is made available to the arrester. The action is competent in any Sheriff Court to whose jurisdiction the arrestee is subject, although the common debtor may not reside within such jurisdiction.[4]

**Actions between Landlord and Tenant,** including actions of ejection and of removing, and of sequestration for rent, which are properly not actions in the ordinary sense but processes of diligence, are and have always been regarded as peculiarly suited for decision in the Sheriff Court, and in such cases the jurisdiction of the Sheriff is exclusive. Such actions must therefore be raised in the Sheriff Court.

[1] See Smith *v.* Kippen, 1860, 22 D. 1495; Forrest *v.* Forrest, 1863, 1 M. 806; Davidson *v.* Clark, 1867, 6 M. 151.

[2] Clark *v.* Melville, 1880, 8 R. 81.

[3] Burnet *v.* Morrow, 1864, 2 M. 929.

[4] Act, s. 6 (9), Rule 128; Sheriff Court Act, 1877, ss. 47, 12 (1), 8.

*Removing.*—The action of removing is one at the instance of a landlord against a tenant whose term of occupancy is alleged to have come to its stipulated close, and is the only legal method of displacing a tenant who refuses voluntarily to quit subjects, to occupy which he has ceased to have a title. The original statutory directions for this process, embodied in the Act 1555, have long been obsolete, though the Act itself has never been specifically repealed. For about a century the process of removing was regulated by the Act of Sederunt of 14th December 1756, the provisions of which, though occasionally made use of, were in practice superseded by the Sheriff Court Act of 1853, which up till the passing of the Act of 1907 continued to regulate the process of removing. Subsequent legislation, however, such as the Agricultural Holdings Acts of 1883 and 1890, and the Removal Terms Act of 1886, tended to create some confusion, and some doubt was experienced as to the application of the forms of the Act of 1853.[1] The Act of 1907, by consolidating the law, has removed these doubts and set the process of removing upon a clear and definite footing. In form an action of removing is one *ad factum præstandum.* But a decree of removing is not appealable, although it may be brought under the review of the Supreme Court by means of a suspension.

*Ejection* is the method by which a decree of removing, if not obeyed, is enforced.

*Sequestration for rent* by a landlord of the effects of his tenant over which he has a right of hypothec is of two kinds: either in payment of past-due rents, or in security of rents not yet due. The landlord's right of hypothec for the rents of land, including the rents of any buildings upon it, of greater extent than two acres, let for agriculture or pasture, except in the case of rents due under leases current at 11th November 1881, was abolished by the Hypothec Abolition (Scotland) Act of 1880.[2]

The consideration of these actions is reserved for the section dealing with special forms of procedure.

## VII. Accessory Actions

**Transference** is the action by which the representatives of a deceased litigant may be compelled to come in his place.

[1] Fyfe, Sh. Ct. Code, p. 55.

[2] 43 Vict. c. 12.

The Sheriff in such actions must have jurisdiction over the representatives as well as in the original action.[1] Such actions are rare in practice.

***Meditatio fugæ*** warrants were granted to prevent a debtor escaping from his creditors by leaving Scotland, and were competent only in respect of debts upon which civil imprisonment might follow, *i.e.* alimentary debts, rates and assessments, and taxes, penalties, or fines due to the Crown.[2] Review of a warrant to apprehend *meditatione fugæ* required to be brought by way of suspension in the Court of Session.[3] Since the recent decision in Glenday *v.* Johnston,[4] imprisonment under a *meditatione fugæ* warrant may now be regarded as abolished.

[1] Cameron *v.* Chapman, 1838, 16 S. 907.

[2] Debtors' Act, 1880, s. 4; 1882, ss. 4, 5; *see* Kidd *v.* Hyde, 1882, 9 R. 803; Hart *v.* Anderson's Trs., 1890, 18 R. 169.

[3] Hart *v.* Anderson's Trs., *sup.*

[4] 1905, 8 F. 24.

# CHAPTER V

## DECLINATURE OF JURISDICTION


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A SHERIFF, like any other Judge, may be disqualified from exercising his judicial functions in any particular action which may be brought before him, either from interest in the subject-matter of the action itself, or from the fact that he is related to either of the parties to it. The declinature may be proponed by either of the parties, but it is *pars judicis* to decline the jurisdiction where neither party takes objection. A plea of declinature should be taken *in initio litis*,[1] though it must be given effect to whenever stated.[2]

**Interest in Cause.**—The disqualification arising from the fact that the Sheriff possesses an interest in the cause is founded in nature itself,[3] and is wholly independent of statute. Though the rule is of wide application, the precise nature or extent of the interest necessary for disqualification is incapable of exact definition. The tendency of the Court is towards a relaxation of a strictly severe interpretation of the rule, but generally, perhaps it may be said that a Sheriff will be disqualified from acting whenever his interest in a cause is of such a kind as to be reasonably likely to prevent the discharge of his judicial duties in a perfectly impartial and unbiassed frame of mind. Thus a Judge in the Supreme Court is not necessarily disqualified by reason that he has acted as counsel in the cause,[4] though that fact has been held to be a sufficient reason for permitting him

[1] D. of Atholl *v.* Robertson, 1869, 8 M. 299.

[2] Ommaney *v.* Smith, 1851, 13 D. 678.

[3] Ersk. i. 2, 25.

[4] King *v.* King, 1841, 4 D. 124.

to decline to act.[1] And while the fact that a Sheriff is one of a body of statutory trustees[2] or Commissioners of Supply[3] is not sufficient to infer disqualification, the fact that he is a trustee, under a private trust, to one of the parties to the suit is sufficient to give him such an interest in the cause as to disqualify him from acting.[4] It is not a ground of declinature that a Sheriff is a partner of any joint stock company carrying on as its sole or principal business the business of life and fire or life insurance, where such company is a party to the proceeding in which he is called to exercise his jurisdiction, nor is it a ground of declinature that he is possessed, merely as a trustee, of any stocks or shares of any incorporated company where such company is a party to the proceeding.[5] But he is still disqualified if he happens to be a shareholder, not as a trustee, but as an individual, or a director or partner in any incorporated company.[6] He is not, however, disqualified by reason of the fact that he is a proprietor or shareholder, even as an individual, of the shares of the capital stock of a *chartered* bank;[7] though it is a disqualification if he be an ordinary director of such a bank, though not if he occupy the merely honorary position of an extra-ordinary director.[8] The possession, therefore, of shares as an individual in any company other than a chartered bank or a joint stock fire and life or life insurance company, or as a trustee in any company not incorporated, will be sufficient to disqualify a Sheriff from acting in any cause to which such company is a party. While direct pecuniary interest, however small, or other interest, if substantial or calculated to cause bias, will disqualify, an interest which is remote or purely contingent will not do so, especially if the result of the disqualification would be to cause grave public inconvenience. Thus a magistrate who was an *ex officio* trustee of a public library was held not to be disqualified from acting as a judge in an action at the instance of the public prosecutor against a person who

[1] Free Church of Scotland *v.* Macrae, 1905, 7 F. 686; M'Cardle, 1906, 8 F. 419.

[2] Blair *v.* Sampson, 26 Jan. 1814, F.C.

[3] Ld. Adv. *v.* Edin. Comrs. of Supply, 1861, 23 D. 933; Lyall *v.* Lanark Comrs. of Supply, 1859, 21 D. 1136.

[4] Martin *v.* Heritors of Kirkcaldy, 1840, F.C. 379.

[5] 31 & 32 Vict. c. 100, s. 103.

[6] Aberdeen Town and Co. Bank *v.* Scot. Equit. Inv. Co., 1859, 22 D. 162; Wauchope *v.* N. B. Rly. Co., 1863, 2 M. 333–4.

[7] Anderson *v.* Bank of Scot., 31 Jan. 1840, F.C. 547.

[8] A. S., 1 Feb. 1820.

was accused of wilfully causing damage to the furniture of the library.[1] Similarly, the magistrate of a burgh was held not disqualified by interest from trying a complaint of unlawfully taking the sand from the seashore, while the right of the burgh to that sand was the subject of a pending action.[2] A Judge cannot, of course, be a witness in a cause which is pending before him, and if in any case or for any reason a Sheriff is required as a witness, his declinature in the cause may be successfully proponed.[3]

**Relationship.**—The disqualification resulting from relationship to the parties is the creation of Statute. The Act 1594, c. 216, made it incompetent for a Judge of the Court of Session to sit or vote in any action in which his father, brother, or son might be the pursuer or defender. The Act 1681, c. 13, extended the preceding Act to all Judges, and added sons-in-law, uncles, and nephews, besides extending the relationship to females in the same degree. Father includes grandfather and great-grandfather, and son includes grandson and great-grandson, and nephew and uncle, grand or great-grandnephew or uncle.[4] But these are the only relationships which disqualify, and except in the cases enumerated by the Statute, the disqualification does not extend to relationships by affinity. Thus the fact that the Judge's wife is sister to the wife of one of the parties,[5] or that his niece[6] or grandniece[7] is married to one of the parties, is no ground of declinature. But the Statute applies if, for instance, the niece is herself a party and not merely the wife of a party.[8] It is not necessary, in order to disqualify, that the relationship should be either to the pursuer or defender, and it is sufficient if it extend to any person who is immediately or directly interested in the action. Thus, where the Sheriff is the brother-in-law of a mandatary, the jurisdiction must be declined,[9] as it must also be where his son-in law is the substitute heir to the claimant of an

[1] Wildridge *v.* Anderson, 1897, 25 R. (J.C.) 27; Belfrage *v.* Davidson's Trs., 1862, 24 D. 1132.

[2] Downie *v.* Fisherrow Harbour Trs., 1903, 5 F. 101 (J.C.); Rae *v.* Hamilton, 1904, 6 F. (J.) 42.

[3] Clark *v.* Wardlaw, 1845, 7 D. 268.

[4] Stair, iv. 39, 14.

[5] Goldie *v.* Hamilton, 16 Feb. 1816, F. C.

[6] Erskine *v.* Drummond, 1787, M. 2418.

[7] Gordon *v.* Gordon's Trs., 1866, 4 M. 501.

[8] Calder *v.* Ogilvy, 1712, M. 197.

[9] Campbell *v.* Campbell, 1866, 4 M. 867.

entailed estate, the right to which is in dispute.[1] Nor does it obviate the disqualification that the relative suing has no personal pecuniary interest in the action, but appears only as a trustee or in an official capacity.[2]

**Waiver of Declinature.**—Where the declinature is based upon relationship, it cannot be waived by consent of parties, since the objection depends on Statute. Where, however, the objection is based on the ground of interest, the declinature may competently be waived by consent of parties.[3] But where the declinature cannot be waived, or where it may be but is not waived, all proceedings before the disqualified Judge are null.[4] Where the declinature is not stated *in initio litis*, objection to the jurisdiction may be stated at any time, and the Judge must instantly give effect to the objection, with the result that the action must be commenced anew before another Judge.[4] In the event of the declinature of a Sheriff-Substitute, the cause may competently be tried before another Sheriff-Substitute appointed for the same county, or before an honorary Sheriff-Substitute or before the Sheriff. The disqualification of the Sheriff does not infer that of the Sheriff-Substitute,[5] though in that case an appeal from the Sheriff-Substitute's judgment lies only to the Court of Session. In the event of both Sheriffs being disqualified, further procedure falls to be regulated by the Court of Session on appeal.[6]

[1] Shaw Stewart *v.* Porterfield, 1821, 1 S. 10 (N.E. 6).

[2] Alexander *v.* Heritors of Kirkcaldy, 1840, 12 Jur. 284; Clyne *v.* Clyne's Trs., 1847, 19 Jur. 547; Highland Road Comrs. *v.* Machray, 1858, 20 D. 1165.

[3] Cal. Rly. Co. *v.* Ramsay, 1897, 24 R. (J.C.) 48.

[4] Ommaney *v.* Smith, 1851, 13 D. 678.

[5] Wallace *v.* Colquhoun, 1823, 2 S. 139.

[6] *See* Moubray's Trs. *v.* Moubray, 1883, 10 R. 460; Moncrieff *v.* Moncrieff, 1904, 6 F. 1021.

# PART II

## THE ORDINARY COURT AND THE ORDINARY ACTION

# INTRODUCTORY

## THE SHERIFF COURTS ACT OF 1907

Prior to the passing of the Act of 1907, which for convenience is throughout the volume referred to simply as the Act, the Sheriff exercised his civil jurisdiction in three separate and distinct Courts, the Ordinary, the Debts Recovery, and the Small Debt Courts respectively, which, alike as regards the forms of procedure and the nature and extent of the actions appropriate to them, differed radically from each other. Of these three Courts, but two remain. The Debts Recovery Court owed its being to the Act of 1867, and to it were appropriated all actions to which the antiquated and somewhat quaint phraseology of the Triennial Prescription Act of 1579 applied, where the debt sued for, exclusive of expenses and dues of extract, exceeded £12 but did not exceed £50. The Court was established for the recovery, by summary procedure, for the most part resembling that of the older Small Debt Court, of debts of the limited class described which exceeded the limit of value competent in the Small Debt Court, but which did not exceed in value the somewhat arbitrary limit of £50. While designed to provide a cheap and expeditious method of recovering debts of a certain class, its operation did not in practice tend greatly to expedition. And the fact that the arbitrary and limited class of cases to which its provisions extended largely hampered its utility, and that the fees payable to agents under its table of fees were wholly incommensurate with the time and trouble involved in the conduct of its causes, occasioned dissatisfaction on the part both of litigants and of solicitors. After a fitful and somewhat inglorious career of thirty years, it was finally abolished by the Act of 1907. But while it ceased to exist as a separate Court, it was nevertheless universally recognised that much of its procedure deserved preservation in the conduct of causes where the value of the subject in dispute exceeded that competent

in the Small Debt Court, yet fell below that of causes appropriate for decision in the Ordinary Court. As will be seen, the limit in value of causes competent in the Small Debt Court under the provisions of the Act of 1907, is now £20. Similarly, under the provisions of the Act, the privative jurisdiction of the Ordinary Court has been raised to actions where the value does not exceed £50. The Act, therefore, while abolishing the Debts Recovery Court, has provided an efficient substitute whereby all actions concluding for the payment of sums exceeding £20 but not exceeding £50, whatever be the nature of the claim, may be tried in the Ordinary Court by a new and summary procedure, closely analogous in many respects to that formerly in use in the Court now abolished, and sufficiently elastic to make such procedure really summary, not merely in name but in fact.

The Small Debt Court was instituted in 1825, and was designed to facilitate the summary recovery of small debts and the disposal of competing claims to small sums of money. The original Act has been amended by subsequent legislation, and while originally the limit in value of actions competent in the Court was £5, that limit has been gradually raised, till now, under the Act of 1907, it stands at £20. But apart from the extension of the pecuniary limit and of the introduction of some minor reforms, the Act of 1907 does not deal with the Small Debt Court, the procedure in which is therefore regulated, subject to the minor reforms referred to, by the Small Debt Acts, 1837 to 1889. The jurisdiction and procedure of the Small Debt Court is treated of separately.

The procedure of the ordinary Sheriff Court is now regulated by the Act of 1907, which repeals, though, with important alterations, amendments, and additions, it substantially re-enacts the various provisions of the earlier Acts, extending from 1838 to 1877, so far as these related to the civil procedure of the Court. Prior to the Act of 1907, the procedure of the Court was mainly regulated by the Act of 1876, though many of the provisions contained in the Act of 1853, and many of the rules contained in the Act of Sederunt of 10th July 1839, continued to be operative. For the most part the earlier Statutes made no attempt at codification, each Statute simply declaring that all prior legislation, so far as inconsistent with the provisions thereby enacted, should be held as repealed. The Act therefore to a large extent codifies, and to some extent

amends, previously existing procedure, while to a relatively large and highly important extent it introduces innovations not only in previous procedure, but in the jurisdiction of the Sheriff, and as regards the kind of action which may competently be tried in the Sheriff Court. That, however, it does not provide or aim at providing a complete and substantive code of Sheriff Court procedure, is sufficiently obvious from the fact that the provisions of the Act are expressly declared not to affect the right of appeal, or the exclusion or allowance of appeal competent under any Act of Parliament in force at the date of its coming into operation.[1] It will therefore not only be convenient but necessary, in the following pages, to indicate to what extent the Act codifies the provisions of the earlier Statutes, since, of course, decisions of the Supreme Court pronounced with reference to them form a valuable and authoritative body of precedent in the interpretation of the corresponding clauses of the Act of 1907. The precise determination and interpretation of the effect of any amendments and alterations in existing procedure effected by the Act must be dependent on the future decisions of the Supreme Court with reference to them. But where the phraseology of the Statute is such as to be reasonably capable of judicial construction, some indication of their probable effect and meaning may be expected to be derived from a consideration of previous decisions bearing on, or having reference indirectly to, the provisions of the earlier Acts so amended. Provisions which introduce entire innovations on existing procedure must be left wholly to judicial construction, though, so far as it may be permissible, some attempt may be made to indicate the probable trend of such judicial decision, as, for example, where the introduction of innovations upon the existing powers and jurisdiction of the Sheriff, or upon practice and procedure, has been the result of conscious dissatisfaction with the earlier powers and provisions which such innovations are expressly designed to supersede, modify, or extend.

Where the Statute merely codifies the provisions of the earlier Statutes, an attempt will be made in all cases to indicate the sources from which the various clauses of the Act have been drawn, and a reference to all decisions of the Supreme Court bearing on the clauses of the earlier Acts incorporated in, and therefore authoritative with regard to, the corresponding clauses of the Act of 1907, will

[1] Act, ss. 7, 28.

be given. While generally the amendments or innovations introduced by the Act will be noticed in their appropriate places, it may not be amiss at the outset to sketch briefly the more salient of them.

Of the amendments, the first and not the least important relates to the form of the Act itself. The clauses of an Act of Parliament can be modified or altered only by subsequent legislation. Therefore where, as in all previous Statutes relating to Sheriff Court procedure, rules of procedure and forms of pleading are contained *in gremio* of the Statute itself, no alteration or amendment of them, however trifling, can be effected without a resort to subsequent legislative enactment. In the Act of 1907, however, the enactments which relate solely to procedure and forms of pleading are incorporated, not in the statute itself, but in an appendix or schedule, with the result that, while such enactments have the force and effect of statutory provisions, they are capable of being added to, amended, and altered from time to time by the Court of Session, who may by Act of Sederunt make such regulations as may be necessary for carrying the purposes of the Act into effect and as are not inconsistent with its provisions.[1] So far, therefore, as relates to procedure and forms of process, the Act, together with the relative Acts of Sederunt issued or to be issued, forms a complete code. The amendment next perhaps in importance consists in raising the limit of the privative jurisdiction of the Court from £25 to £50. In future, no action in which the value of the subject in dispute does not exceed £50 can be brought under the review of the Court of Session. Among the other amendments of importance are: Where there are several defenders resident in different Sheriffdoms, an action may competently be brought in the jurisdiction where any one of them resides. Formerly, where the defenders did not all reside within the same jurisdiction, an action against them was competent only in the Supreme Court. A corporation or association, or a firm nominate or descriptive, or a board corporate or unincorporate, may be sued and diligence executed against it under its nominate or descriptive name alone, without, as formerly, the inclusion of the name of any partner or official connected with it. The Sheriff has power to transfer a cause to another Sheriffdom should such a course be deemed advisable

[1] *See* Act, ss. 39, 40.

in the interests of justice; and where a plea of no jurisdiction is sustained, he may now, instead of dismissing the action, order its transference to the jurisdiction of the Sheriff before whom, in his opinion, it ought originally to have been brought. Where an action is defended, the Sheriff may now allow an amendment or alteration of the record (including an amendment of the instance and of the initial writ and the addition of parties), to the effect of determining the real question in controversy between the parties. Any amendment of the instance or of the initial writ, as by an alteration in the prayer, or in the amount sued for, or the addition of a defender not previously included, was formerly wholly incompetent. The confining of the initial writ to a simple statement of the claim or demand made by the pursuer, with the consequent obviation of the necessity for the addition of a detailed condescendence and pleas in law in the case of an undefended action, and the permission given to the Sheriff of granting decree in an undefended action at any time after the expiry of the induciæ without a formal calling of the action in Court.

Among the innovations introduced by the Act, the more noticeable besides the abolition of the Debts Recovery Court and the substitution in its place of the Summary action, are the following: The jurisdiction of the Sheriff is now extended to actions of separation and aliment, to all actions of declarator (except those relating to questions of status), and to those in which questions of heritable right and title are involved, which were formerly competent only in the Court of Session. A system of Jury Trial in certain causes is for the first time introduced into the civil procedure of the Sheriff Court, and a counter claim may be pleaded as a defence to an action, and decree granted in respect either of the whole or a part of it, or for the difference between it and the sum claimed, as if it had been stated in a substantive action, as was formerly necessary. The jurisdiction of the Sheriff with respect to foreigners has been placed on all fours with that of the Court of Session, so that now in all cases a foreigner subject to the jurisdiction of the Scots Courts may be convened before any Sheriff in whose jurisdiction liability has been founded by arrestment; and lastly, the rules as to the recording of evidence in shorthand are made conform to those obtaining in the Court of Session.

# SECTION I

## THE ORDINARY COURT AND THE ORDINARY ACTION[1]

## CHAPTER VI

### THE ORDINARY COURT


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THE jurisdiction of the Sheriff is exercised in two Courts, the Ordinary and the Small Debt, which, alike as regards the value of the cause which may competently be tried and their procedure, are separate and distinct. They are, however, so far dependent on one another that any cause brought in the Small Debt Court may be remitted to the Ordinary Court, if in the opinion of the Sheriff the importance of any question raised in the cause warrants that course; and conversely, any action raised in the Ordinary Court may, if the parties agree, be remitted to the Small Debt Court, the action in each case thereafter proceeding in the Court to which it is remitted as if it had originally been raised there. The Small Debt Court is concerned only with actions the subject of which does not exceed £20 in value, while the Ordinary Court takes cognisance of all actions competent in the Sheriff Court which are not specially appropriated to the Small Debt Court. In the Ordinary Court, actions are divided into summary and ordinary, according to their value. Summary actions include all those (except applications

[1] The word "ordinary," as applied both to the Court and to the action, has no statutory or other authority for its adoption. Its use has, however, now become stereotyped both with professional men and the public.

under the Workmen's Compensation Act and actions *ad factum præstandum*) which conclude for a payment of money exceeding £20 and not exceeding £50, exclusive of interest and expenses; while ordinary actions comprise all others where the value of the subject in dispute exceeds £50. But any action, of whatever kind (except applications under the Workmen's Compensation Act and those under the Small Debt Acts), notwithstanding that its value exceeds £50, may be treated as a summary cause if the parties to it so consent. Actions in the Ordinary Court, whether summary or ordinary, are divisible into two great classes: those in which the ordinary or normal procedure of the Court is followed, and those which involve special forms of action and procedure.

**1. Ordinary Actions** are those in which the forms and procedure applicable to an ordinary petitory action concluding for the payment of a sum of money are followed. All such actions, whether summary or ordinary, involve, in their initial stages, identical procedure,[1] though in their subsequent stages summary causes involve radically different procedure from that followed in ordinary actions. And while in ordinary actions certain normal procedure takes place in every case, special circumstances may necessitate the adoption of incidental proceedings. For convenience, therefore, the procedure in an ordinary action from the initial writ to the final judgment by the Sheriff will first be considered, then such occasional or exceptional proceedings as may be necessitated by the peculiarities of the case, and finally the means by which the pursuer of the action may carry a judgment in his favour into execution against his debtor.

**2. Special Actions** comprise all those which do not fall into the category of ordinary, such as petitory actions other than those concluding for a payment of money, possessory actions and those containing declaratory conclusions, as well as those the proceedings in which are regulated by special statutes.

**3. Sittings of Court.**—Each Sheriff Court has two sessions in the year, the winter and the summer, the former extending from the first ordinary court day in October to the last ordinary court day in March, and the latter from the first ordinary court day in May to the last ordinary court day in July. The sittings of the Court may, however, be suspended at Christmas time for a period not exceeding fifteen days.[2] The Secretary for Scotland has power to prescribe

[1] Except as regards the warrant.

[2] Act, s. 25; *Act of* 1876, *s.* 4.

from time to time the number of Courts to be held both by the Sheriff and the Sheriff-Substitute, as well as the times and places for holding such Courts.[1] The exercise of his power is, however, optional, and failing its exercise the arrangement of the business within the Sheriffdom and the allocation of work amongst the Sheriffs-Substitute rests with the Sheriff in virtue of the administrative powers vested in him at common law. The Act, however, contains no provision similar to that of section 42 of the 1853 Act, prescribing that during session each Sheriff Court (except in places where there was no resident Sheriff-Substitute) should sit for the dispatch of ordinary civil business for such number of days in each week as might be fixed by the Sheriff, by a regulation of Court to be approved of by the Lord President and the Lord Justice-Clerk.[2] Before the termination of each session, the Sheriff must appoint at least one Court day during the spring vacation and two court days during the autumn vacation for the dispatch of civil business. All causes may proceed during vacation as during session, and in all causes interlocutors may competently be pronounced during vacation.[3]

**4. Rolls and Minute-Books.**—The practice of the different Courts varies, but it is believed that in general at least two books are kept of the proceedings of the Ordinary Court,—a motion roll and a minute-book. In the former are entered for each Court day all the causes which are to be called that day. These may be enrolled either by order of the Sheriff, or by the Sheriff-Clerk in the course of his official duty, or by the Sheriff-Clerk on the motion of either party. In the two former cases there are no special regulations as to notice of enrolment, but the Sheriff must take care not to put either party to disadvantage. When the cause is enrolled by one of the parties, the notice to be given is fixed by regulation or usage in each Court, but in general the party must give to the Clerk and to the opposite party forty-eight hours' notice of the enrolment of an ordinary action, and twenty-four hours' notice in the case of an

[1] Act, ss. 18, 19.

[2] It seems an anomaly to permit a purely lay official to determine matters connected with the administration of justice. The provision, however, which vests in the Secretary for Scotland the power of prescribing the number of Courts and the places at which they shall be held, and of so making the Court conduce to public convenience, may prove extremely useful in practice.

[3] Act, s. 26 ; *see* 1853 *Act*, *s.* 44, *and* 1876 *Act*, *s.* 5.

action requiring extraordinary dispatch. The notice must be in writing, and must be delivered at the office of the opposite agent, or posted to him. The notice specifies the purpose of the enrolment, which sometimes is inserted in the motion roll.

The minute-book (or "diet-book") usually contains a memorandum of all important proceedings not appearing on the motion roll—such as short references to interlocutors pronounced by the Sheriff, orders by him for regulating the business, memoranda of appearances entered, proofs taken, papers lodged, and other steps in processes. In some Courts the commendable practice is followed of having a separate book for minuting all decrees. There is also kept in some places a book which is very convenient for the Agents, namely, a register of all appearances which have been entered.[1]

**5. Processes and Pleadings.**—The initial writ, the condescendence, the defences, and the various other pleadings and productions are inventoried as they are lodged, endorsed with the date of lodging, and together form the process. The initial writ after tabling remains in the custody of the Sheriff-Clerk, unless the Sheriff grants a special order to the contrary,[2] and a duplicate copy is lodged for inclusion in the process.[3] In a defended action the pursuer must also lodge a principal and a borrowing inventory of process, the latter remaining in the custody of the Sheriff-Clerk.[4] The pleadings and productions may be either wholly or partially written or printed. A process may be borrowed only by an Agent entitled to practise in the jurisdiction, or by his duly authorised clerk, for whose actings he is responsible.[2] An agent who, having borrowed a process, fails to return it, or any part of it, in time for any diet in the cause for which the process or the part borrowed may be required, is liable to a fine not exceeding £1, but the order imposing such fine may, on cause shown, be recalled by the Sheriff who granted it. Such an order is not, however, subject to review.[5] This provision takes the place of the old and practically obsolete process caption, under which any failure to return a process timeously might be treated as a contempt of Court, and the process recovered by means of a process caption.[6] A copy of any number of process, which is lost or

[1] Dove Wilson, 4th ed., pp. 91, 92.

[2] Act, Rule 16; Law Agents Act, 1873, s. 15.

[3] Presumably, though the Act is silent on the subject.

[4] Act, Rule 18.

[5] Act, Rule 57; Act of 1876, s. 21.

[6] *See infra*, Process Captions.

destroyed, authenticated in such manner as the Sheriff may require, may be substituted for all purposes for the original.[1]

**6. Interlocutor Sheets.**—In a defended action the pursuer must lodge with the Sheriff-Clerk a principal and a duplicate interlocutor sheet, the former of which remains in the custody of the Sheriff-Clerk, while the latter forms a number of the process. The principal interlocutor sheet, if lost or destroyed, could not formerly be replaced like a number of process.[2]

**Pursuer's duty to make-up and lodge Process.**—It has always hitherto been, and presumably will continue to be, the pursuer's duty to make-up and lodge the process with the Sheriff-Clerk. The Act makes no provision on the subject, and indeed its terms might almost lead to the inference that no process is required to be made-up or lodged prior to the lodging of defences. The awkwardness which would necessarily follow from such an interpretation of the statutory provisions is perhaps a justification for supposing that no such result was intended.

[1] Act, Rule 17.

[2] *See* Cofton *v.* Cofton, 1875, 2 R. 599, as to proving the tenor of a lost interlocutor sheet under the Court of Session Act of 1868.

# SECTION II

## THE ORDINARY ACTION AND ITS NORMAL PROCEDURE

### *INITIAL PROCEDURE*

## CHAPTER VII

### THE INITIAL WRIT


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ALL proceedings in the Sheriff Court, whatever be the amount or nature of the claim, with the exception of petitions for the service of heirs and completion of title under the Titles to Land Consolidation Act, 1868, and the Conveyancing Act of 1874, begin by the initial writ, the form of which is prescribed by the Act. The form consists of (1) an introduction; (2) the names and designations of the parties; (3) a concise statement of the general nature of the claim or demand, ground of appeal or cause of action; (4) a crave for the specific decree, warrant, or order desired, including, where desired, expenses; and (5) the pursuer's name, or that of his Agent, with his address.

**1. The Introduction** gives the name of the Sheriffdom and of the place where the action is raised.

**2. The Designation of Parties. (1) The Pursuer.**—The word "pursuer" means and includes any person making a claim or demand, or seeking any warrant or order.[1] The full name, designation, and address of the pursuer is set forth, or at least he must be described in such a way as to leave no dubiety as to his identification.[2] If he sues in any special character, such as trustee or executor, the fact must be stated, and, where necessary, the fact of any relationship to the defender must be added. As examples of the relationship which must, if necessary, be added, the statutory form gives "wife of defender" or "creditor of defender," from which it may be inferred that the kind of relationship contemplated by the Act is not necessarily that of blood or affinity, but the legal position in which the parties stand towards each other. Thus in an action for payment of money it is unnecessary to state the fact that pursuer is a creditor of the defender, since that must be assumed as the basis of the action; but where a wife or child sues for aliment, the fact of the relationship should be added. The relationship of the parties must, however, be given only where necessary, that is, apparently, when it is the basis or ground of the claim, or out of which the claim directly arises. The wide power given to the Sheriff under the Act of allowing at any stage an amendment of the instance,[3] has obviated most of the difficulties which previously existed with regard to the proper designation of the pursuer, since no action can in the future suffer materially from a careless or improper designation. As a check upon undue carelessness or slovenliness, the amendment may be allowed, in the discretion of the Sheriff, only upon payment of such expenses as he may think proper. Care should therefore be taken to ensure that the designation of the pursuer is correct, so far as circumstances permit, and that it should be such, at any rate, as to leave no reasonable doubt as to the person at whose instance the action is raised.

*Combination of Pursuers.*—There is no limit to the number of persons who may sue in one action, but several pursuers may sue in one action only where there is community of interest arising out of the subject-matter of the action, or because all have suffered damage

[1] Act, s. 3 (n).

[2] *See* Improved Edin. Propy., etc., Socy. *v.* White, 1906, 8 F. 903.

[3] Act, Rule 79.

from the same act of the defender.[1] It is, however, incompetent for two or more pursuers with no common ground of action to sue in the same action, since the mere fact that each has a good claim against the same defender gives them no community of interest.[2] Thus, for example, two parties holding separate bonds cannot unite in one poinding of the ground.[3] And where five different pursuers sued for their respective debts against the debtor in one action, the action became competent only when four of the pursuers withdrew.[4] Where, however, a number of persons have a common ground of action arising out of one debt or obligation, though their respective pecuniary interests may differ, as for instance where several persons are injured by the same accident or aggrieved by the same slander, they may competently combine together as pursuers in one action, provided there are separate conclusions for the pecuniary amount payable to each respectively.[5] Thus two people who had been forcibly ejected from certain premises were held entitled to sue in the same action against their assailants for payment of a sum of damages to each in respect of the assault.[6] And where five separate actions had been raised by the owners and representatives of a fishing-boat which was sunk in a collision with a steamer, each action concluding for a different sum in name of damages, it was held that the pursuers of the actions might competently have them conjoined.[7] So parties possessing a community of interest in the subject-matter of an action, as for instance the prevention of the pollution of a river or the vindication of a right of way, may competently vindicate their common claim in one action.[8] But where two proprietors of conterminous estates sued for interdict in one action, it was held that, so far as the action concluded for interdict against trespassing on the two estates, it was incompetent, in respect that there was no community of interest, neither proprietor

[1] Brims & Mackay *v.* Patullo, 1907, S.C. 1106; Paxton *v.* Brown, 1908, S.C. 406; Killin *v.* Weir, 1905, 7 F. 526; Ballantyne *v.* Ballantyne's Trs., 1897, 4 S.L.T. 467 (O.H.); Gatt *v.* Angus Shipping Co., 1907, 14 S.L.T. 749 (O.H.).

[2] Gibson *v.* Macqueen, 1866, 5 M. 113; Ballantyne *v.* Ballantyne's Trs., *sup.*

[3] Douglas *v.* Tait, 1884, 12 R. 10.

[4] Fischer & Co. *v.* Anderson, 1896, 23 R. 395.

[5] Revey *v.* Murdoch, 1857, 3 D. 888; Harkes *v.* Mowat, 1862, 24 D. 701; Mitchell *v.* Grierson, 1894, 21 R. 367; Black *v.* Fraser, 1900, 8 S.L.T. 225 (O.H.).

[6] Black *v.* Fraser, *sup.*

[7] Gatt *v.* Angus Shipping Co. Ld., *sup.*

[8] D. of Buccleuch *v.* Cowan, 1876, 4 R. (H.L.) 44; Torres *v.* D. of Atholl, 1849, 12 D. 328.

having any title to nor interest in the estate of the other, and that, so far as it concluded for interdict against fishing in a certain river, it was competent only as regarded that portion which flowed between the two estates.[1] Where several persons possess a joint title to sue in respect of one individual wrong done them by the defender, all must unite in the action, and an action at the instance of only one of the aggrieved parties is incompetent, unless he is able to aver that the others have refused to concur with him, or unless he calls them in the action for their interest. Thus one of a number of children was held not entitled to raise an action of damages for *solatium* in respect of an unauthorised post-mortem examination of his father's body.[2] Where, however, all parties possessing a title to sue do not appear in the instance, the proper course would appear to be to appoint intimation to be made to those non-compearing, in order to give them an opportunity of sisting themselves if they so desire.[3] Where two parties sue an action in their joint names, the action will be dismissed as incompetent if it turn out that the title to sue resides in only one of them. Thus a joint action at the instance of a father and mother for reparation for the death of their child was dismissed as incompetent, in respect that the mother had no title to sue while her husband was alive.[4] Under the provisions of the clause referred to, however, such an action would not, in the Sheriff Court, fall to be dismissed, since on the motion of the pursuer the instance might at any time be competently amended so as to exclude the name of the pursuers having no title to sue. Under the provisions of the section of the Act referred to, the Sheriff possesses the power not only of allowing an amendment of the instance, but of allowing an addition to the parties. That this means the addition of new pursuers seems obvious, apart altogether from the absence of any express limitation of the word parties, from the fact that the *ratio* for permitting such an addition is that the real question in controversy, and not merely that between the parties, may be determined. The power thus conferred seems therefore to be greater than that conferred upon the Supreme Court by the Court of Session Act of 1868, which permits, in a defended cause, the amend-

[1] Arthur *v.* Aird, 1907, S.C. 1170.

[2] Pollok *v.* Workman, 1900, 2 F. 354; Grant *v.* Wood, 1902, 10 S.L.T. 186 (O.H.).

[3] Smith *v.* Wilsons & Clyde Coal Co., 1893, 21 R. 162; Smith *v.* New Rossleigh Cycle Co., 1902, 10 S.L.T. 166 (O.H.).

[4] Bell *v.* Laing, 1895, 4 S.L.T. 252 (O.H.).

ment of any error or defect in the record or issues of any action, or such amendments generally as may be necessary for determining the real question at issue between the parties. Apart from the express or implied limitations of that Act, the all but invariable rule in the Supreme Court was that a motion to amend the summons, for the purpose of adding additional parties, was not allowed without the consent of the defender. Thus new pursuers could not be added without the defender's consent.[1] The Act of Sederunt of 20th March 1907 provides that where an action has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction is deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court, if satisfied that it has been so commenced through *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as may seem to the Court proper. The language of the Act of 1907 would appear at first sight to confer upon the Sheriff a power of permitting the addition of parties superior even to that enjoyed by the Supreme Court. Such a construction of the Act is of course absurd, and therefore it may be assumed that the limits of the Sheriff's powers and the grounds on which such powers should be exercised are similar to those contained in the Act of Sederunt relating to the Supreme Court. Under the provisions of the Act of 1907, any number of new pursuers may apparently be competently added, but where the instance is radically bad, no amendment, presumably, will be allowed which would have the effect of making it good. In other words, where the pursuer is met by the defence of no title to sue, he will not, presumably, be allowed to make an amendment in the instance which has the effect of introducing an entirely new pursuer who does possess such a title, though, if the instance be good, no objection to an amendment, which simply introduces pursuers who, while having a title to sue, have been omitted from the instance or who have previously refused to become parties to the action, will be given effect to.[2]

[1] Remington *v.* Bruce, 1829, 7 S. 692; Taylor *v.* Crawford, 1833, 12 S. 39; Anderson *v.* Harboe, 1871, 10 M. 217; Hyslop *v.* Macritchie's Trs., 1881, 8 R. (H.L.), 95.

[2] *See* Hyslop *v.* Macritchie's Trs., *sup.*

*Amendment of Instance.*—A matter which is closely allied to that just considered is how far a pursuer who has raised the action under an improper title can now remedy that defect by amending the instance. As has been seen, the Act specifies that if the pursuer sues in any special character, that fact must be stated. A similar provision was made by the Act of 1876, and it was held that though apparently such a character was merely descriptive of the pursuer, it was necessary as really forming the ground of the action. Thus where a person sued as an individual he was not permitted to change his character from that to a trustee or executor.[1] Under the provisions of the Act of 1907, however, the instance may be amended by adding the real character under which the pursuer sues. Thus, if he sue as an individual he may amend the action by introducing his real character of trustee, executor, or guardian. It is, however, doubtful if a person who raises an action in the name of another, through and from whom his title to sue flows, will be allowed to amend the instance so as to disclose his real character in the event of the titular pursuer disclaiming or refusing to become a party to the action. Thus in one case an assignee, who had raised the action in the cedent's name, was not allowed to sist himself as a party on the nominal pursuer disclaiming the action.[2]

*Executors* are designed by their names, addresses, and the title under which they act, and, provided their title to sue be *prima facie* good, may sue though unconfirmed.[3] But an executor must produce confirmation before he can extract the decree.[4] Without either nomination or decree-dative, executors have no title to sue,[5] and while it is advisable that the action should be at the instance of all those acting, an action will, in special circumstances, be sustained, though only at the instance of a majority,[6] or even of one.[7]

*Trustees* are similarly designed, and may sue in the name of the majority sanctioned by the trust deed, or if there be no *quorum* of the majority of those accepting.[8] But where a trustee or trustees

[1] Smith *v.* Stoddart, 1850, 12 D. 1185; Turnbull *v.* Veitch, 1889, 16 R. 1079; Anderson *v.* Duncan, 1861, 23 D. 258.

[2] Gordon *v.* Purvis & Others, 1903, 11 S.L.T. 16 (O.H.).

[3] Maitland *v.* Cockerell, 1827, 6 S. 109; Munro *v.* Tod, 1829, 7 S. 648; Balfour *v.* Baxter Bros., 1852, 24 Jur. 295.

[4] Reid *v.* Turner, 1830, 8 S. 960.

[5] Malcolm *v.* Dick, 1866, 5 M. 18.

[6] M'Laren on Wills, ii. 185.

[7] Ballantyne *v.* Ballantyne, 1899, 7 S.L.T. 2 (O.H).

[8] Blisset's Trs. *v.* Hope's Trs., 1854, 16 D. 482.

are defenders, and in case of necessity, as where co-trustees decline to join in the action, the remainder may sue, and a single trustee has sufficient title to raise an action of multiplepoinding for his exoneration.[1]

*Pupils* having no tutors, raise the action in their own names, a curator *ad litem* being subsequently appointed by the Court if the action is defended.[2] Where they have tutors the action is raised in the tutor's name, concluding for decree in his favour *qua* tutor. If the father of the pupil be alive and have no interest adverse to that of the pupil, an action in the pupil's name is incompetent.[3] Similarly, *minors* having no curators sue in their own names, a curator *ad litem* being appointed on the motion of either party. Where a minor has curators they ought to be specified, though their subsequent consent to the action seems to be sufficient.[4]

*Married Women* may in certain cases, under the provisions of the Married Women's Property Act of 1881, sue in their own names without their husband's consent or concurrence. In general, a married woman sues in her own name with the consent and concurrence of her husband. Where the husband refuses his consent, and the action is competent at the instance of the wife alone, a curator *ad litem* may be appointed. A married woman has no title to sue for reparation on account of the death of her child while her husband is alive,[5] and this rule applies even where the husband has been divorced and his whereabouts are unknown.[6]

*Corporations or Associations*, firms nominate or descriptive, or boards corporate or unincorporate, may now sue and be sued under their nominate or descriptive names alone, without, as was formerly necessary, the inclusion of the names of any partners.[7] Under a special Act which is still operative, banking companies sue in the name of the company, with the addition of that of a registered officer.[8]

**(2) Defenders.**—The word defender means and includes any person who is required to be called in any action.[9] The rules applicable

[1] Shanks *v.* Aiken, 1830, 8 S. 639; Blair's Trs. *v.* Blair, 1863, 2 M. 284.

[2] Cunningham *v.* Smith, 1880, 7 R. 424; Ross's Trs., 1894, 21 R. 995.

[3] Carrigan *v.* Cleland, 1907, 15 S.L.T. 543.

[4] *See* Balfour Melville, Pet., 1903, 5 F. 347.

[5] Barrett *v.* N. B. Rly. Co., 1899, 1 F. 1139.

[6] Aiken *v.* Gourlay, 1903, 5 F. 585.

[7] Act, s. 3 (e); Rules 11, 151.

[8] 7 Geo. IV. c. 67.

[9] Act, s. 3 (o).

to the case of pursuers apply equally to that of defenders. Defenders must be designed in such a way as to leave no reasonable doubt as to the person intended, and if sued in any special character, such as trustee, tutor, curator or executor, that fact must be stated. Where the action is undefended, an error in the defender's name may lead to a reduction of the proceedings.[1] Where, however, the action is defended, the power of amendment now given to the Sheriff under the Act,[2] obviates the consequences formerly attendant on an inaccurate or careless designation of the defender, and no mere inaccuracy, however careless or inexcusable, will now necessarily be followed by dismissal of the action.[3]

*Plurality of Defenders.*—There is no limit to the number of defenders who may be sued in one action, provided the liability against each arises out of the same ground or grounds. Defenders against whom there is no joint liability should not be sued in the same action. An action has, however, been held competent in which a pursuer called five different defenders and concluded against each separately for a sum of £29, on the averment that each of them had individually employed him to do a certain piece of work.[4] And where a pursuer sued two defenders in one action on the averment that one had acted illegally at the instance of the other, it was held there was sufficient connection between them to make the action competent.[5] In the case of a joint obligation, all the defenders must be convened in the same action, each being liable *pro rata* for a share of the sum decerned against them. Where the obligation is joint and several, each of the defenders is liable for the whole amount decerned for. In actions upon joint and several obligations not constituted by writing or decree, it is necessary to call all the joint obligants as parties to the action; but where the joint and several obligation depends upon writing (or, as will be seen, upon delict), any one of the joint obligants may be called independently of the others and decree pronounced against him individually.[6] When, however,

[1] Spalding *v.* Valentine, 1883, 10 R. 1092; Brown *v.* Rodger, 1884, 12 R. 340.

[2] Act, Rules 79, 76.

[3] *See* Brown *v.* Rodger, 1884, 12 R. 340; Cruikshank *v.* Gow, 1888, 15 R. 326; Watt *v.* Smith's Trs., 1901, 9 S.L.T. 172; Riach *v.* Wallace, 1899, 1 F. 718.

[4] Miller & Co. *v.* Forrester, 1897, 5 S.L.T. 95 (O.H.).

[5] Scot. Co-op. Socy. *v.* Glasgow Fleshers, etc., 1898, 35 S.L.R. 645 (O.H.).

[6] Neilson *v.* Wilson, 1890, 17 R. 608.

an action with such a conclusion is brought against two defenders, the pursuer does not lose his right of action against one of them merely because he settles or compromises his claim against the other.[1] Similarly, in an action concluding against several defenders jointly and severally, as for a lump sum by way of damages, it is competent to assoilzie one and grant decree against the remainder.[2] And under a joint and several conclusion it is competent to pronounce merely a joint decree,[3] while a joint and several decree may be granted though no conclusion exists therefor, if it be in accordance with the nature of the liability established in the action.[4]

*In actions of Delict.*—Where the action arises out of delict, the rule is that each delinquent is liable *in solidum*; and so where one only out of several co-delinquents is called to answer for the wrong, the plea of all parties not called will be repelled and the action sustained.[5] Co-delinquents may be sued jointly and severally where the wrong out of which the action arises is due to their joint default. Where, however, the wrongs in respect of which several defenders are convened in one action are separable and distinct, there must be a separate conclusion with reference to each defender, and it is incompetent to sue the several defenders jointly and severally for a lump sum by way of damages in respect of separate wrongs, as, for instance, for a sum of damages against two successive tenants of a farm, or in respect of separate and distinct slanders by a husband and wife, or for a sum of damages in respect of illegal acts committed respectively by a creditor and a debt-collector.[6] Thus, in an action which concluded jointly and severally or severally for a lump sum against several defenders, only some of whom were averred to be responsible for the wrong which was the ground of claim, it was held that the action was incompetent and leave to amend was refused.[7]

[1] Douglas *v.* Hogarth, 1901, 4 F. 48; Fleming *v.* Gemmill, 1907, S.C. 340.

[2] Reilly *v.* Smith, 1904, 6 F. 662; Baird's Trs. *v.* Leichman & Others, 1902, 10 S.L.T. 324 (O.H.); Robinson *v.* Reid's Trs., 1900, 2 F. 928, *per* Ld. Moncreiff; Mackersy *v.* Davis & Sons Ld., 1895, 22 R. 368.

[3] Gillespie *v.* Paisley Road Trs., 1900, 7 S.L.T. 350 (O.H.).

[4] Brodie *v.* Coplan, 1906, 14 S.L.T. 35 (O.H.).

[5] Sim *v.* Muir's Trs., 1906, 8 F. 1091; Beatt *v.* Ogg and Others, 1897, 4 S.L.T. 374 (O.H.); Mackay *v.* Mackay, 1897, 4 S.L.T. 466 (O.H.); Croskery *v.* Gilmour's Trs., 1890, 17 R. 697.

[6] Sinclair *v.* Caithness Flagstone Co., 1898, 25 R. 703; *following* Barr *v.* Neilson, 1868, 6 M. 651, *and* Taylor *v.* MacDougall, 1885, 12 R. 1304.

[7] Conway *v.* Dalziel, 1901, 3 F. 918.

In an action of damages for slander concluding against a husband and wife conjunctly and severally, it was averred that the wife slandered the pursuer, and the husband subsequently adopted and repeated the slander. The Court dismissed the action as incompetent, in respect that as there was no averment of conspiracy the action was really one for a lump sum against different defenders in respect of separate wrongs.[1] And where an action concluded for payment jointly and severally against two persons, while the averments disclosed the fact that only one was responsible, it was held that the action fell to be dismissed except in so far as it referred to the person against whom liability was averred.[2] It is, however, apparently competent to conclude jointly and severally against two or more defenders for one sum in name of damages for an alleged wrong where, though the actual acts of commission are distinct and separable, they have yet been contributed to in some degree by the parties jointly, as where it is averred that damages have been caused through the fault of the defenders, or both or one or other of them.[3] Thus it is competent to conclude for damages jointly and severally for breach of contract against both the party actually in breach and a third party who is mainly instrumental in bringing the breach about,[4] and against a person guilty of an illegal act along with the person who actively instigates its commission.[5]

In all questions connected with a plurality of defenders, whether the obligation in respect of which they are sued is joint or several, the provisions of the Act of 1907 will be kept in mind. Thus, formerly in cases where there was more than one defender and it was necessary to convene them all in one action, a resort to the Court of Session was generally necessary, since if all the defenders did not reside within one Sheriffdom an action in the Sheriff Court was incompetent. Under the provisions of the Act, however, an action against several defenders may now be raised in the Sheriffdom

[1] Hook *v.* MacCallum, 1905, 7 F. 528.

[2] Hannay *v.* Muir, 1898, 1 F. 306; Smyth *v.* Muir, 1891, 19 R. 81.

[3] Caughie *v.* Robertson & Co., 1897, 25 R. 1. Ld. Trayner, however, expressed grave doubts as to the decision, which, considering that neither Barr *v.* Neilson nor Taylor *v.* MacDougall appear to have been considered, seems of doubtful authority, especially in view of the decision in Sinclair *v.* Caithness Flagstone Co., *sup.*; *see also* Findlay *v.* Glennie, 1894, 1 S.L.T. 482; Muirhead *v.* Watt & Wilson, 1895, 3 S.L.T. 71 (O.H.).

[4] Belmont Laundry Co. *v.* Aberd. Street Laundry Co., 1899, 1 F. 45.

[5] Scot. Co-op. Socy. *v.* Glasgow Fleshers, etc., 1898, 35 S.L.R. 645 (O.H.).

in which any one of them happens to reside, the remainder being thereby rendered subject to the jurisdiction.[1] Again, under the power given to the Sheriff to amend the pleadings to the affect that the real question in controversy may be determined, amendments formerly incompetent even in the Supreme Court are now permissible. Thus amendments of the initial writ (subject, of course, to such conditions as to expenses or otherwise as the Sheriff may see fit to impose) may be allowed, to the effect not only of striking out the names of parties against whom the action may be found incompetent, but of adding to the list of defenders those who have not previously been called. The plea, therefore, of "all parties not called" is one which in future may lead not to dismissal of the action, but merely to a question of expenses. The Statute lays down that when a defender is called in any special character, as trustee, for example, that fact must be stated. Formerly, where after the service of the action the fact was disclosed that while a defender had been sued as a private individual, he ought to have been sued merely in some representative character, or *vice versa*, the action fell to be dismissed, since it was held that the character was not merely an accident but was of the essence of the action.[2] Now, however, under the provisions of the Act, such an amendment may be competently made at any stage of the action.

*Executors and Trustees*, when called as defenders, are designed in the same way as if they had been pursuers. Where a pupil is the defender, the action is directed against both him and his tutors *nominatim*, if known, or against such tutors as he may have, if none are known. If no guardians appear, a tutor *ad litem* must be appointed. Minors interested in the defence of an action should be called *nominatim* as defenders, although they have a *curator bonis*,[3] but the curators should be called as well. If the minor have no curator, a curator *ad litem* may be appointed by the Court.[4] Service in ordinary form on a minor and on his father, as curator-at-law; or upon a minor and his tutors and curators if known to the pursuer, or if they are not known, upon the minor himself in ordinary form, and his tutors and curators edictally, is a good and

[1] Act, s. 6 (a).

[2] *See* Dempster *v.* Dryborough, 1837, 16 S. 109; Anderson *v.* Harboe, 1871, 10 M. 217.

[3] King's Trs. *v.* M'Lay & Others, 1901, 8 S.L.T. 328 (O.H.).

[4] Cunningham *v.* Smith, 1880, 7 R. 424.

sufficient service on the minor for every purpose of law.[1] A married woman cannot act as curator to a minor.[2] If the father be dead and the mother living, she should be called as guardian.[3] Corporations or associations, firms nominate or descriptive, and boards corporate or unincorporate, are sued under their nominate or descriptive names alone, without the addition of the names of any partners.[4] In actions against married women the husband should be called for his interest.

**3. The Statement of Claim** consists of a summary of the general nature of the claim or demand made by the pursuer, or, in other words, of a concise statement of the ground or cause of action. The statement of claim is entirely novel in Sheriff-Court procedure, and is an approach to a form in use in England, though previously unknown in Scotland. The statement must obviously be (1) as concise as may be consistent with intelligibility, and (2) it must express a claim capable of statement without argument or comment, and without quotation from documents except perhaps where absolutely indispensable. The Act of Sederunt of 1839 provided with reference to summonses, that the statement of claim should be a concise and accurate statement of facts, and should set forth in concise though explicit terms the nature, extent, and grounds of the complaint or cause of action. The terms of the Act do not, however, appear to contemplate that the statement shall be more than the briefest summary, or be such as to make the action relevant.

**4. The Crave or Prayer.**—In the crave the pursuer sets forth the specific decree, warrant, or order asked, giving all the particulars to be embodied (if necessary) in the extract. The crave must therefore in the first place be relevant, that is, it must crave a particular decree which the Court is competent to give, and it must be so expressed as ultimately to be competently embodied in an official extract of Court. It must not, therefore, be vague. Thus, if the ground of action be that the defender has failed to implement a contract, the crave must specify the precise mode in which the contract is to be fulfilled, and a crave praying merely for implement without specification of the mode is too indefinite.[5] Similarly, a

[1] Act, Rule 14 ; Act of 1876, s. 12 (4).

[2] Chalmers' Trs. *v.* Sinclair, 1897, 24 R. 1047.

[3] 49 & 50 Vict. c. 27.

[4] Act, Rule 11 ; *see* Citation.

[5] Robertson *v.* Cockburn, 1875, 3 R. 21 ; M'Dougall *v.* Buchanan, 1867, 6 M. 120 ; Winans *v.* Mackenzie, 1883, 10 R. 941.

crave in which pursuers ask for a decree that they are entitled to the free use, possession, and enjoyment of a muir in the same manner as they were formerly accustomed to use, possess, and enjoy it, is too vague without further specification.[1] Nor must the crave ask for more than the pursuer is legitimately entitled to, since if he ask too much he may be found liable in expenses[2] or be subjected to a subsequent action of damages.[3] Thus, to crave for production of a writ when mere exhibition of it would satisfy the pursuer's demands might result in the defender's contesting an action to which otherwise he would have offered no opposition. Where an action concludes for payment, such payment may be craved for in one sum or by instalments, at the present time or on a future date, but in each case the crave must be explicit and definite both as regards amount and time.[4] Where there are more defenders than one, and the pursuer desires decree against them jointly and severally, he ought so to express himself in his crave. Where the action is defended the initial writ may, under the provisions of the Act, be now amended, not only, as formerly, in matters of detail or incidental to the question in dispute, but in matters of such vital moment as the amendment of the crave and the addition of defenders not originally made parties to the action, notwithstanding that the conclusions of the action are thereby enlarged or altered.[5] All such amendments are subject, of course, to such conditions as to expenses, re-service, or otherwise as the Sheriff may deem expedient.[5] In circumstances, therefore, where formerly a supplementary action was necessary, the result may now be achieved by a simple amendment of the crave. Similarly, where a defender is sued along with others jointly, the crave may be amended so as to make his liability joint and several. In short, every amendment which has the effect of enabling the Sheriff to determine the real question in controversy is now competent, subject to the conditions mentioned.

**5. Interest and Expenses**—(1) *Interest.*—In a note to the schedule containing the form of petition under the Act of 1876, it is laid down that where interest or expenses, or either, are sought, they must be

[1] Henderson *v.* E. of Minto, 1860, 22 D. 1126.

[2] Smith *v.* West of Scot. Exch. Inv. Co., 1847, 10 D. 213; M'Pherson *v.* Walker, 1869, 8 M. 246.

[3] Tennant's Trs. *v.* Maxwell, 1880, 17 S.L.R. 463; Oswald *v.* Græme, 1851, 13 D. 1229.

[4] Macintosh *v.* M'Tavish, 1828, 6 S. 994.

[5] Act, Rule 79.

prayed for. Apart altogether from these provisions, the rule has always been, except in actions of count and reckoning,[1] that interest prior to the date of the decree cannot be given unless it is craved for. Formerly such interest could not be obtained even by amendment[2] or by supplementary action.[3] Interest prior to the date of decree will not therefore now be given unless it is specially craved for, though under the provisions of the Act, where it has been initially omitted, the crave may be amended in a defended cause so as to include it. Formerly, where interest was not craved in an undefended cause, it could not be awarded; now, however, it may be claimed by amendment. Interest is, however, always due from the date of the decree, and may therefore be recovered either upon the sum awarded in the decree or upon the expenses decerned for on taxation of the account by the Auditor.[4] Interest may be due *ex conventione*, as upon a contract, express or implied, or *ex lege*, in virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it should have been paid.[5] Where interest is stipulated for expressly by the terms of a contract or agreement, interest should be craved at the stipulated rate. As there is now no legal rate,[6] in all other than exceptional circumstances, interest should be asked at five per cent. The rate, however, may, in special circumstances, be restricted, as where the delay in payment is due to the creditor's own fault,[7] or where agents of a trust retain, with the consent of the trustees, trust money pending litigation.[8] So the interest allowed on a claim for *legitim* between the date of the parent's death and the date of payment was at the rate which had been earned by the funds out of which the *legitim* fell to be paid, in a case where there had been delay on the part of the pursuer in claiming payment.[9] And a person found entitled to rescind his

[1] Donaldson *v.* Findlay, 1860, 22 D. 937; *affd.* 1864, 2 M. (H.L.) 86.

[2] Mackay's Prac. i. 381; Shotts Iron Co. *v.* Turnbull, 1870, 8 M. 383.

[3] Edin. & Glas. Canal Co. *v.* Carmichael, 1842, 1 Bell's Ap. 316.

[4] Dalmahoy *v.* Mags. of Brechin, 1859, 21 D. 210; Wallace *v.* Henderson, 1876, 4 R. 264.

[5] Cal. Rly. Co. *v.* Carmichael, 1870, 8 M. (H.L.) 119, *per* Ld. Westbury.

[6] 17 & 18 Vict. c. 90; *see* observations by Lord Young on legal interest in Grant *v.* Grant's Trs., *infra*.

[7] Shirras *v.* Black, 1824, 3 S. 183.

[8] Fortune's Trs. *v.* Gibson-Craig, 1839, 2 D. 59; *see also* M'Kenzie *v.* Campbell, 19th Dec. 1818, F.C.; Robarts *v.* Court, 1835, 13 S. 877; 1838, 3 S. & M. 317.

[9] M'Call's Trs. *v.* M'Call, 1901, 3 F. 1065; Ross *v.* Ross, 1896, 23 R. 802; Grant *v.* Grant's Trs., 1898, 25 R. 948; Christie's Factor *v.* Hardie, 1899, 1 F. 703.

contract to take shares in a company and to repayment of the price, was allowed interest at four per cent. only.[1] And interest may be refused where there has been unreasonable delay on the part of the creditor making the claim or in taking steps to ascertain the amount of principal due.[2] So, in one case where certain trustees had appointed one of their number *in bona fide* to manage a trust fund and had paid him a salary, it was held, on the trustee being subsequently ordained to refund the money received as salary, that he was not liable in interest.[3] And a son who had failed to claim legitim for seventeen years was in another case held not entitled to interest.[4] Interest is due and should be craved from the date when payment actually became due, *e.g.* in the case of a bill from its date if it be not accepted, or its due date if accepted but not paid, in the case of legacies *a morte testatoris*,[5] and in the case of a business account from the date of citation, if no date of payment is fixed, either actually by agreement, or inferentially by custom of trade or the ordinary course of credit. A person who supplies goods, performs work, or renders services, and who gives his debtor credit, may fix the period for which credit is to be allowed, and stipulate that on its termination interest shall begin to run, and if that be the footing on which the goods are supplied or the services rendered the Court will enforce the claim for interest if the period of credit is exceeded.[6] Where, under a contract of copartnership, it was provided that on the retiral of a partner his share in the business should be paid to him by certain instalments at fixed intervals of time, no mention being made of interest, it was held that the terms of the agreement excluded a claim for interest on the instalments between the date of dissolution and that of payment.[7] Compound interest is, as a rule, due from tutors and curators, trustees, or other persons occupying fiduciary positions in respect of money which they have retained, lost, or failed to properly invest, and runs from the date at which such money was lost or should have been invested, though it can be awarded only where specifically craved for. In the case of trustees found personally liable for the loss of the trust estate, or for

[1] Waverley Hydro. Co. *v.* Borrowman, 1895, 23 R. 136.

[2] Cal. Rly. Co. *v.* Carmichael, *sup.*

[3] Mills *v.* Brown's Trs., 1901, 2 F. 1035.

[4] Wick *v.* Wick, 1898, 1 F. 199.

[5] May's Trs. *v.* Paul, 1900, 2 F. 657.

[6] Liquidrs. of Linlithgow Oil Co. *v.* N. B. Rly. Co., 1904, 12 S.L.T. 421 (O.H.).

[7] M'Arthur *v.* Scott, 1899, 6 S.L.T. 208 (O.H.).

having improperly invested the trust funds, the Court will usually allow only simple interest at a rate varying between three and four per cent.[1] A claim for compound interest otherwise good may be excluded by inference from the actings of parties, as where a bank was held not entitled to compound interest on certain advances made, it being a fair inference from its actings that it had not proposed to make such a claim originally.[2]

(2) *Expenses.*—Under the Act of 1876, expenses required to be specifically asked where they were desired. The Act of 1907, however, neither directs that expenses must be craved for, nor does it expressly exclude a decree for expenses where they are not asked. The ordinary rule, which in the case of the Sheriff Court was temporarily displaced by the Act of 1876, is that in the matter of expenses the Court is absolute master, and possesses an inherent power of awarding them against any one, whether named in the initial writ or not, who has been the cause of the litigation.[3] Although, therefore, expenses have been omitted to be asked for, the Court will, where the action is defended, grant an award in the usual terms.[4] But it is doubtful, where the action is not defended, whether they can be recovered if they have not been craved. Under the provisions of the Act of 1907, decree may be granted on the expiry of the induciæ,[5] and as the crave expresses the specific decree which the pursuer seeks, a decree "as craved" would not carry expenses if no craving for them existed. Therefore, unless there be a certainty that the action will be defended, expenses should in every case be asked for; and where there are more defenders than one and it is desired to make them liable in expenses jointly and severally, the crave should be so expressed. In adjudications, only the expenses of constitution are concluded for.[6] The expense of an application to found jurisdiction by arrestment, or of any arrestment on the dependence, cannot be given and should not therefore be craved,[7] and on similar principles the expense of

[1] Campbell's Exrs. *v.* Campbell's Trs., 1898, 25 R. 687; Melville *v.* Noble's Trs., 1896, 24 R. 243; Mustard *v.* Mortimer's Trs., 1899, 7 S.L.T. 103 (O.H.); Hardie's Trs. *v.* Graham, 1896, 3 S.L.T. 428 (O.H.); Ferrier's Tr., 1897, 5 S.L.T. 82 (O.H.).

[2] Wilson's Trs. *v.* Clydesdale Bank, 1899, 7 S.L.T. 112 (O.H.)

[3] Mitchell *v.* Baird, 1902, 39 S.L.R. 681, *per* Ld. Kinnear; *cf.* Webster *v.* Webster, 1903, 40 S.L.R. 271.

[4] Heggie & Co. *v.* Stark, 1826, 4 S. 518; Scott *v.* Wilson, 1829, 7 S. 566.

[5] Act, Rule 23.

[6] Smith *v.* Kippen, 1860, 22 D. 1495.

[7] Black *v.* Jehangeer Framjee & Co., 1887, 14 R. 678.

an application for the imprisonment of an alimentary debtor will probably be refused.[1]

**6. Warrant to Arrest.**—Arrestment on the dependence of the action may be obtained either by a crave inserted in the initial writ, or by an application for a separate precept of arrestment. Some doubt has been expressed whether, under the form of petition sanctioned by the Act of 1876, it was necessary that the prayer should contain a formal crave for a warrant to arrest on the dependence, or whether it was not sufficient to ask the Sheriff-Clerk to insert it in the warrant of citation.[2] That doubt has, however, been resolved by the Act of 1907, which provides that in the crave the specific decree or warrant which the pursuer desires shall be inserted. As the warrant may or may not be put into execution as may be found expedient, and as its inclusion in the crave cannot do any harm, there seems no reason why, in every case in which it is competent, it should not be included in the crave. But arrestment on the dependence is competent only in actions containing conclusions for payment other than expenses.[3] It is not, therefore, competent on the dependence of an action of divorce by a wife against her husband, even when it contains conclusions for her *jus relictæ*, in the event of her obtaining a decree of divorce.[4] And even when the crave is for payment of money, arrestments cannot competently be used unless the crave concludes for the payment of a sum of money as presently due, and not for a mere future or contingent debt, as for future aliment in an action of separation and aliment, unless the defender is *vergens ad inopiam*,[5] *in meditatione fugæ*, or about to put away his funds.[6] It is also incompetent in actions merely declaratory if without pecuniary conclusions, and its competency was sustained with difficulty in an action of count and reckoning where the action assumed that the balance might be either way.[7] Where, however, the arrestment is used in an action concluding for payment, it covers both expenses and the interest on the sum sued for.[8] Arrest-

[1] M'Leod *v.* Layes, 1883, 27 J. of J. 388; Strain *v.* Strain, 1886, 13 R. 1029.

[2] *See* Dove Wilson, 4th ed., p. 210.

[3] Stafford *v.* M'Laurin, 1875, 3 R. 148; Mackenzie *v.* Ferrier, 1900, 7 S.L.T. 316 (O.H.).

[4] Ellison *v.* Ellison, 1901, 4 F. 257.

[5] Crear *v.* Morrison, 1889, 9 R. 890.

[6] Symington *v.* Symington, 1875, 3 R. 205.

[7] Telford's Exr. *v.* Blackwood, 1866, 4 M. 369.

[8] May *v.* Malcolm, 1826, 4 S. 76; M'Donald *v.* Wingate, 1825, 3 S. 494.

ment is used *periculo petentis*, and may therefore, if improperly used, found an action of damages.[1] It may be instantly loosed on caution being found *judicatum solvi*, or to make the particular subjects arrested forthcoming when needed, and may be restricted by the Sheriff as to amount.

**7. Authentication of Writ.**—The writ must be signed by the pursuer or by his agent, with the addition of such agent's designation, business address, and authority to sign. The Act of Sederunt of 1839 provided that all pleadings should be subscribed by the parties themselves, or by a procurator of Court or other person legally authorised to act. In view of the provisions of the Law Agents Acts and of the relative Acts of Sederunt, nothing need be said, save that only qualified Law Agents can sign the initial writ. An agent may be liable for defamatory matter stated by him in the pleadings where the statement is not pertinent to the case,[2] and when statements, even though relevant, are made maliciously, an agent may be held liable for the fault of his client.[3] There are therefore conceivable circumstances in which it might be prudent to have the pursuer's signature attached to the initial writ. The name and address of the pursuer's agent (if any) must be on the back of every service copy.

**8. Copy Account.**—Where the claim or demand is founded upon a stated account, a copy of such account must be endorsed upon or attached to the initial writ and served along with it.[4]

**9. Warrant of Citation.**—Upon presentation of the initial writ to the Sheriff-Clerk, a warrant of citation, in the form of an interlocutor, is indorsed upon it. The form of the warrant differs, according as the action is summary or ordinary. In the former no notice of appearance is requisite, and the defender is cited on certain induciæ to answer in the Sheriff Court-house upon a certain day, the number of the particular room in the building or of the particular Sheriff's Chambers, or as the case may be, being specified. In the latter he is cited, if he intend to defend the action, to lodge a notice of appearance within certain induciæ. In either case appropriate warrants may be added, as, in summary actions, of sequestra-

[1] Wolthekker *v.* Nor. Agric. Co., 1862, 1 M. 211.

[2] Johnston *v.* Scott, 1829, 7 S. 234; Bayne *v.* M'Gregor, 1862, 24 D. 1126.

[3] Scott *v.* Turnbull, 1884, 11 R. 1131.

[4] Act, Rule 2.

tion (with warrants to inventory and secure), or of arrestment on the dependence, or as the case may be; and in ordinary actions, of interim interdict, of arrestment on the dependence, of sequestration (with warrant to inventory), or as the case may be. The warrant authorises the citation of the defender either by serving him with a copy of the writ and the warrant, or by serving him edictally. All actions proceed upon a seven days' warning or induciæ when the defender is within Scotland, or fourteen days when he is in Orkney or Shetland or in any other island within Scotland, or is furth of Scotland. In all warrants to cite persons furth of Scotland, a warrant to cite edictally must be inserted. The Sheriff may, however, either shorten[1] or extend the induciæ, but not so as to be in any case less than forty-eight hours. The provision enabling the Sheriff to extend the induciæ is introduced for the first time, and may prove a useful extension of his powers. The warrant is ordinarily signed by the Sheriff-Clerk, though any warrant may competently be signed by either Sheriff. But it must be signed by a Sheriff if it contains an order for shortening or extending the induciæ, or for interim interdict, sequestration, or other order which is not merely an order for citation or warrant to arrest. The Act of Sederunt of 1839 provided[2] that when the defender was a minor, his tutors and curators should be summoned edictally upon the same induciæ as the principal defender. The Act of 1907, following that of 1876, provides that service in ordinary form upon a minor and (where they are not known) upon his tutors and curators edictally shall be a sufficient service.[3] Edictal citation, with the exception of that upon the curators and tutors of a minor, is a mode of citation appropriate only in the case of persons furth of Scotland, in whose case the induciæ is invariably fourteen days, and is incompetent where a defender is *de facto* resident in Scotland though information as to his address has been refused by his relations.[4] But edictal citation need not necessarily proceed upon fourteen days' induciæ, though with the exception mentioned it has never been authorised upon a shorter period. The provisions of the Act of 1907 with reference to the citation of tutors and curators would therefore seem to mean that where they

[1] *See* Muir *v.* Nisbet, 1881, 19 S.L.R. 59.

[2] Sec. 22.

[3] Act, Rule 14.

[4] Robertson *v.* M'Culloch, 1836, 14 S. 950.

are not known, edictal citation upon a fourteen days' induciæ is now implied, though the Court may shorten it.

**10. Writ cannot be Borrowed.**—The initial writ, once it is tabled, remains in the custody of the Sheriff-Clerk and cannot be borrowed or given up unless the Sheriff grant a special order to the contrary.[1] The Act of 1876 provided that it should so remain unless the Sheriff gave a special order to the contrary in writing. The word "grant" is probably equivalent to the phrase "give in writing." In every defended action the pursuer must, after defences have been lodged and before the diet of adjustment, lodge in process a copy of the initial writ, and the warrant thereon certified by him or his agent, which may thereafter be borrowed by the agent of any party to the process (though not by the parties themselves, who have only a right to see the process in the hands of the Sheriff-Clerk), and such certified copy is a sufficient warrant, where competent, to arrest on the dependence.[2]

NOTE.—*The statutory expression "initial writ" is open to serious criticism on several grounds. In Glasgow, in accordance, it is understood, with a widely expressed desire, the initial writ is now, by order of the Sheriff of Lanarkshire, simply described, in terms familiar under previous practice, as the Petition.*

[1] Act, Rule 16.

[2] Act, Rule 45.

# CHAPTER VIII

## SERVICE ON DEFENDER


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### Service of Writ

**1. Modes of Service.**—After the warrant upon it has been duly signed by the Sheriff or the Sheriff-Clerk, the initial writ is returned to the pursuer for the purpose of serving the defender with notice of the action. The date of the citation, that is, of the execution of service, is the commencement of the action.[1] Service consists in delivering to the defender a copy of the initial writ, including the warrant of service, together with a schedule of citation, and is effected either (1) by delivery by an officer of Court, or (2) by posting in a registered letter either (*a*) by an officer of Court or (*b*) by an enrolled Law Agent.

**2. Service by delivery by Officer of Court.**—If the warrant is executed by an officer,[2] one witness, who must be a male above fourteen years of age,[3] and who may or may not be connected with the officer,

[1] Alston *v.* Macdougall, 1887, 15 R. 78; Gibson *v.* Clark, 1895, 23 R. 294.

[2] Under the law existing prior to the passing of the Act of 1907, it did not appear quite clear whether an officer of the Court of Session (messenger-at-arms) might not competently effect the service, and the Act does nothing to resolve the doubt. *See* Cheyne *v.* M'Gungle, 1860, 22 D. 1490; Sutherland *v.* Standard Life Ins. Co., 1902, 4 F. 957.

[3] Davidson *v.* Charteris, 1738, M. 16899.

is sufficient to attest the execution.[1] The Act of 1838 prescribed that the service should be made in presence of the witness, and though the Act of 1907 does not so prescribe in terms, it may be assumed that the personal presence of the witness at the execution of citation is necessary. The officer must not be interested personally in the action[2] and at the time of service he must be in possession of the original writ, which he must, if required, exhibit to the defender, though not to any other person.[3] Service by the officer may be effected in one or other of the following ways: (*a*) By delivering or tendering the copy writ and schedule of citation to the defender personally; (*b*) by leaving a copy of the writ and schedule with a person or servant at the defender's dwelling-house; (*c*) by affixing a copy of the writ and schedule to the door, or leaving it in the keyhole of defender's dwelling-house; (*d*) by delivering or tendering the writ to the defender personally at his place of business, or if he be not found there by leaving it with some one at, or affixing it to the door or leaving it in the keyhole of, such place of business; (*e*) where the defender is out of the jurisdiction of the Court granting the warrant, but within that of another Sheriff Court, by service in any of the foregoing modes, without any indorsation by the Sheriff-Clerk of the jurisdiction, by an officer either of the Court granting the warrant or of the jurisdiction within which it is executed; (*f*) where the defender is furth of Scotland, by delivery of the copy writ and schedule at the office of the keeper of edictal citations; (*g*) where the defender is a minor and his tutors and curators are not known, by service on such tutors and curators edictally.

*Schedule of Citation and Service Copy.*—The schedule, which may be wholly or partly written or printed, is signed by the officer and contains an intimation to the defender, or to each defender if there be more than one, that he is served with a copy of the writ and warrant, to which it is appended or affixed, and requires him to answer thereto conform to the terms of the warrant. The copy of the writ must have the name and address of the pursuer's Agent (if any) marked on the back.[4] It was not formerly necessary to serve a copy of an account to which a petition referred,[5] but now, where the claim is founded upon a stated account, a copy of such

[1] Act, Rule 9.
[2] Dalgleish *v.* Scott, 1822, 1 S. 506.
[3] Lermont, 1699, M. 3096.
[4] Act, Rule 3.
[5] Cunningham *v.* Milroy, 1865, 3 M. 733.

account must be endorsed or attached to the initial writ and served along with it.[1]

*Service on Defender personally* may take place, wherever he happens to be found, at his house, his place of business, his club, or in the street. The service is complete whenever a tender of the copy writ and schedule has been made to the defender, and it is immaterial that he has refused to accept the documents,[2] or has obstructed service of the writ upon him.[3] If the person cited refuses to accept delivery, the fact must be stated by the officer in the execution of citation.[2] Personal service is of vital importance in certain cases, as forming an element in the liability of the defender to the jurisdiction. Thus, when the action arises out of the delict of the defender committed within the Sheriffdom, or where it relates to a contract the place of execution or performance of which is within the Sheriffdom, the defender, if, as in the case of a foreigner, he be not otherwise subject to the jurisdiction, must be personally cited within the Sheriffdom, to render him subject to the jurisdiction.[4]

*Service at Dwelling-House* of defender is made by calling at the house, demanding to see the defender, and if he is within, seeking in all legitimate ways short of actual violence or threats, to gain admission to his presence. If the defender be out, or if he be within, and after reasonably persistent attempts to gain admission or to secure a personal interview, such admission or interview is refused or cannot be obtained, the officer may then leave the copy writ and schedule with a servant. Servant in this case includes the defender's wife, daughter, son, or other relative or person resident in the house, the mere fact of receiving the documents constituting such person a servant of the defender and excluding all inquiry into the facts.[5] If acceptance of the document is refused, it must be affixed to the door or thrust into the keyhole. "Dwelling place" is any place within the Sheriffdom in which the defender has personally resided for forty days, and from which he has not been absent for forty days. Where a defender has more residences than one, he may be cited at any one of them within the jurisdiction.[6]

[1] Act, Rule 2.
[2] Stair, iv. 38, 15.
[3] Busby *v.* Clark, 1904, 7 F. 162.
[4] Act, s. 6 (f, i).
[5] A. *v.* B. 1834, 12 S. 347; Ersk. iii. 5, 55.
[6] *See ante*, Jurisdiction over Persons, —Residence, p. 29.

*Keyhole Service* is resorted to where, after giving six audible knocks, the officer cannot either gain admittance or prevail upon any one resident in the house to receive the writ. His duty in such cases is either to affix the writ and schedule to the most patent door of the house or to thrust them into the keyhole.

*Service at Business Address.*—Where the defender carries on and has a place of business within the Sheriffdom, he is now amenable to the jurisdiction, provided he is either cited personally or at such place of business.[1] The citation of the defender at his place of business may be effected similarly and subject to the same rules as apply in the case of his dwelling-house. Corporations or associations, firms nominate or descriptive, and boards corporate or unincorporate, are cited either at their principal place of business (which term includes the office or place of business of the clerk or secretary of any board or corporation) or, where the principal place of business is outwith the Sheriffdom, at any place of business within the jurisdiction.[2] Service is effected by delivery or tendering the copy writ and schedule either to a partner, a clerk, or secretary, and if admission to the premises cannot be obtained or acceptance of the writ is refused, the rules prescribed with reference to service at the dwelling-house of the defender must be followed. Where Acts of Parliament relating to railway and other statutory companies prescribe special rules as to the mode of citation, they must be adhered to. Companies registered under the Companies Acts may be cited by transmitting the copy writ and schedule through the post, addressed to their registered offices.[3]

*Service outwith Jurisdiction.*—Any warrant of citation may now, in any competent manner, be lawfully executed within the jurisdiction of any Sheriff without indorsation by the Sheriff-Clerk of that jurisdiction, and may be executed by an officer either of the Court granting the warrant, or of that within which it is to be executed.[4] The warrant is therefore authority for service not only within the jurisdiction within which it is granted, but universally throughout Scotland. Under the provisions of the Act of 1876, where a defender who was subject to the jurisdiction required to be cited in another Sheriffdom, the warrant of citation required to be indorsed by the Sheriff-Clerk of that Sheriffdom, except in cases

[1] Act, s. 6 (b).
[2] Act, Rule 11.
[3] 25 & 26 Vict. c. 89, s. 62.
[4] Act, Rule 10.

where the defender was subject to the jurisdiction by virtue of the provisions of sections 46 and 47 of the Act, that is, in those concerning persons carrying on business within the county, and those concerning actions of furthcoming and multiplepoinding. The necessity of having the warrant indorsed for service has now been universally abolished.

*Edictal Citation* of persons furth of Scotland is affected by delivering a copy of the warrant at the office of the Keeper of Edictal Citations at Edinburgh, according to the mode established in regard to the execution edictally of citations on warrants of the Court of Session. The citation so executed edictally is recorded in the record of edictal citations in a separate record of citations against persons furth of Scotland cited upon warrants proceeding from a Sheriff Court. Where the defender has a known residence or place of business in England or Ireland, a copy of the writ and citation on fourteen days' inducie is posted to such address in a registered letter. In all warrants to cite persons furth of Scotland, the Sheriff-Clerk must[1] insert a warrant to cite edictally.[2] That, however, does not mean that when the defender happens to be temporarily furth of Scotland, a warrant to cite him edictally must be granted, but only that when the circumstances are such as to necessitate edictal citation, according to the ordinary practice of the Court of Session, a special warrant for it shall be issued by the Sheriff-Clerk.[3] Formerly, edictal citation was of comparatively little consequence with reference to actions in the Sheriff Court, since the number of cases in which the Sheriff had jurisdiction over persons furth of Scotland was exceedingly limited. Now, however, that the jurisdiction of the Sheriff Court with respect to foreigners and persons furth of Scotland has been assimilated to that of the Court of Session, edictal citation has assumed a new importance.[4] Edictal citation is incompetent where the defender is *de facto* resident in Scotland, though his actual whereabouts are unknown and information as to his address is refused by his relatives.[5] Though, if he has by his actings induced the pursuer to believe that he is furth of Scotland, edictal citation will be competent.[6] Where the same writ is

[1] Act, Rule 7 says "may," not "shall."
[2] Act, Rule 15; Act of 1876, s. 9.
[3] Gibson *v.* Clark, 1895, 23 R. 294.
[4] *See ante*, Jurisdiction over Persons.
[5] Robertson *v.* M'Culloch, 1836, 14 S. 950.
[6] Sandbach & Co. *v.* Caldwell, 1825, 4 S. 173.

executed at one and the same time against two or more persons edictally, delivery at the office of the keeper of one copy is sufficient, provided that such copy bear upon its face that it is delivered for all and each of such persons.[1] It is incompetent to serve edictally except upon a warrant which authorises edictal service, and if therefore personal service is craved, edictal service is inept upon the warrant.[2] Where, however, there exists a doubt whether the defender is in or is furth of Scotland, a warrant authorising personal and edictal service alternatively seems competent and should be craved. The tutors and curators of a minor, if not known to the pursuer, are now cited edictally and upon a fourteen days' induciæ, in the same manner as persons furth of Scotland.[3]

*Time of Service.*—Service must be made upon a week day.[4] No specified hours are prescribed, but probably it must be made at a reasonable hour, what is reasonable being a question of circumstances. Perhaps a fair criterion may be arrived at, since the passing of the Citation Amendment Act of 1882, by saying it must be made within those hours when a letter by post might competently be delivered. No period is fixed after the issue of the warrant within which service must be made, but the rule, which, however, is only sanctioned by practice, is that service must take place at least within a year and a day.[5]

*Execution of Citation.*—After service the officer annexes a docquet to the writ attesting the execution of the citation, which must be signed by him and the witness, and specify whether the citation was personal, or if otherwise the mode of citation,[6] generally and without detail. The execution of citation is *prima facie* evidence of the facts it states, and though it may be reduced, it is incompetent in the Court of Session otherwise to challenge the execution of citation on any ground not patent upon an examination. The date of the execution of service is the actual date of the execution, not that of the service copy, where they differ. Thus the general rule in actions of reduction of execution is that the formal execution cannot be contradicted by the service copy, and a case in which the contrary

[1] A. S., 11th July 1828, s. 22.
[2] Miller, 1853, 16 D. 109.
[3] Act, Rule 14; Act of 1876, s. 12 (4); *see supra.*
[4] Oliphant *v.* Douglas, 1663, M. 15002.
[5] *See* A. S., 8th July 1831.
[6] Act, Rule 9; A. S. 1839, s. 15.

was held was decided on a special ground.[1] Actions of reduction are of course incompetent in the Sheriff Court, but under the provision of the Act whereby, when a deed or writing is founded on by any party in a cause, all objections to it may be stated and maintained by way of exception without the necessity of bringing a reduction of it,[2] an execution of citation is challengeable *ope exceptionis*. The objector may be ordered to find caution or to make such consignation as the Sheriff may see fit to direct.[3] If it appear to the Sheriff that there has been any irregularity in service upon a defender who has not appeared, the Sheriff may authorise the pursuer or complainer to make service of new upon such conditions as may appear to him to be just.[4] But a party who appears cannot state any objection to the regularity of the service upon himself, and his appearance is deemed to remedy any defect in the service, unless in cases where jurisdiction has been constituted by citation or by arrestment *ad fundandam jurisdictionem*.[5] The requisites of citation being statutory, they must be strictly observed. Thus, where the defender is to be cited at his dwelling-house, it is not a compliance with the statutory requisites to hand the service copy of the writ to the defender's wife when not in her husband's house, nor to hand it to a partner, a clerk, or the secretary of a company, association, or corporation, except within the business premises of the firm.[6]

**3. Service by Postal Citation.**—The mode in which service is now almost universally effected is that introduced by the Citation Amendment Act of 1882. In each of the cases referred to above, citation may be effected by means of a registered postal letter containing the copy writ to be served, with the citation subjoined, instead of by delivery by an officer of Court. The citation must bear the place, date, and if necessary the hour of posting, and, where necessary, state that the induciæ is reckoned from twenty-four hours after the date of posting. It must be signed by the Sheriff Officer or by the Law Agent, with the addition of his designation and business address.[7] The method of postal citation is optional, but except in cases in which the Sheriff considers it not expedient that

[1] Gibson *v.* Clark, 1895, 23 R. 294; Stair, iv. 42, 12; Ersk. 4, 2, 5; M'Donald *v.* M'Leod, 1726, M. 3765.

[2] Act, Rule 50.

[3] Act, Rule 51; Act of 1877, s. 11.

[4] Act, Rule 12; Act, 1876, s. 12 (3).

[5] Act, Rule 13; Act, 1876, s. 12 (2).

[6] C. of Cassilis *v.* E. of Roxburgh, 1679, M. 3695; Sharp *v.* Garden, 1822, 1 S. 337.

[7] Act, Form D.

service should have been made postally, no higher or other fees than those sanctioned by the Act for postal service will be allowed where the services of an officer are made use of. Where, however, a defender is resident beyond the postal district, the expenses of citation by an officer may be allowed.[1]

*By whom given.*—The warrant of citation may be executed through the Post Office either by an officer of Court or an enrolled Law Agent, though not necessarily enrolled in the Court issuing the warrant. Where the warrant is executed in the jurisdiction of a Court other than that which granted the warrant, no indorsation by the Sheriff-Clerk of the latter Court is now necessary,[2] and execution of the citation may therefore now be made by an officer or Law Agent either of the Court which grants the warrant or of the jurisdiction within which it is to be executed.[2] The rule which prevails that an officer cannot serve an action in which he is personally interested, led to the expression of some doubt as to whether, by analogy, the rule was not equally applicable to the case of a Law Agent serving a writ by post. As, however, this method of citation is wholly independent of the person who signs the notice, it has been decided that service by a Law Agent who is himself a party to the cause is valid.[3]

*To whom sent.*—The letter must be addressed to the defender at his known residence or place of business, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the Keeper of Edictal Citations where the warrant requires edictal citation[4]: in other words, it must be addressed to the place at which service of the defender would be competently made if effected under the law existing prior to the Statute, by delivery by an officer of Court. On the back of the letter there must be a notice to the effect that the letter contains a citation to a named Court, and that in case of non-delivery it must be returned to the Clerk of that Court, his address being given.[5]

*Execution of Citation* is written upon the writ in the form prescribed by the Act.[6] It requires no witness, but must be signed by the officer or Law Agent as the case may be. The terms of the

[1] M'Leod *v.* Davidson, 1887, 14 R. 298.
[2] Act, Rule 10.
[3] Addison *v.* Brown, 1906, 8 F. 443.
[4] Cit. Amend. Act, 1882, s. 3.
[5] *Ibid.*, s. 4.
[6] Form E.

execution imply that the letter is posted personally by the officer or Law Agent making the citation, and although the execution is not invalid by reason that it bears to be signed by a Law Agent other than that giving the citation,[1] the signature of an apprentice to a Law Agent is not sufficient to attest execution.[2] The form, *mutatis mutandis*, does not differ from that prescribed for execution by delivery by an officer, but it must specify the day on which, and the hours between which, postage is effected and the name of the Post Office. The execution, when returned to the Sheriff-Clerk, must be accompanied by the Post Office receipt for the registration fee.

*Effect of Postal Citation.*—The date of posting is the date of the citation and of the commencement of the action.[3] If for any reason delivery of the letter is not made, it must be returned immediately through the Post Office, with the reason of failure marked on it, to the Sheriff-Clerk, who intimates the fact to the person who served it. If the warrant have been signed by the Sheriff, the Sheriff-Clerk also presents the letter to him. The reasons for failure to deliver the letter may be because the address cannot be found, the house or place of business is shut up, the person addressed is unknown at the address given, the letter is refused, the place of address is not within a postal delivery district, and the letter is not called for within twenty-four hours after its receipt at the office of the place, or for any other reason. If the Sheriff is satisfied that the letter was tendered at the proper address and refused by the defender or any one authorised to take delivery, he may hold the tender equivalent to citation,[4] and proceed in absence as may be just. Delivery to a servant in the habit of calling at a Post Office for defender's letters is a sufficient delivery to defender.[5] If it appear to him that there has been any irregularity in the service upon a defender who has not appeared, he may authorise service of new upon such conditions as may seem just.[6] But a defender who appears in answer to a citation is precluded from objecting to its regularity except where jurisdiction has been constituted by it.[7]

If the letter be not returned to the Clerk of Court as non-

[1] Tait *v.* Johnstone, 1891, 18 R. 606.
[2] Wilson, 1885, 13 R. 342.
[3] Alston *v.* M'Dougall, 1887, 15 R. 78; Gibson *v.* Clark, 1895, 23 R. 294.
[4] Cit. Amend. Act, 1882, s. 4 (5); Spaulding *v.* Marjoribanks, 1903, 11 S.L.T. 35 (O.H.); Roberts *v.* Crawford, 1884, 22 S.L.R. 135.
[5] Steuart *v.* Ree, 1885, 12 R. 563.
[6] Act, Rule 12.
[7] Act, Rule 13.

delivered, it is presumed to have been delivered in terms of the execution, with its relative receipt, and to constitute a valid citation. The presumption may be rebutted by proof that the letter was not left or tendered at the defender's known residence or place of business or at his last known address.[1] As a defender by appearing is barred from objecting to the citation, the presumption can be rebutted only where decree has been obtained in absence.

**4. Acceptance of Service.**—Service may be dispensed with by defender or his agent writing and signing an acceptance of service upon the initial writ. The acceptance should be holograph.

[1] Cit. Amend. Act, 1882, s. 5.

# SECTION III

## PROCEDURE WHERE ACTION IS UNDEFENDED

## CHAPTER IX

### DECREE IN ABSENCE AND REPONING


I. Decree in Absence

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### I. Decree in Absence

#### (*a*) *Where no Appearance Entered*

**1. Decree granted forthwith.**—When the defender does not answer or lodge a notice of appearance, the Sheriff may at any time after the expiry of the induciæ, upon a written craving to that effect indorsed upon the initial writ by the pursuer or his agent, decern in terms of the claim or demand as set forth in the initial writ, and for the expenses incurred, as certified by a note indorsed upon the initial writ by the Auditor of Court, subject to any restriction indorsed upon the writ or set forth by separate minute by the pursuer or his agent.[1] The language of the Statute of 1876, which

[1] Act, Rule 23.

provided that if no appearance were entered the Sheriff must, on the motion of the pursuer, pronounce decree, was generally understood to mean that decree could be competently pronounced only at a formal sitting of the Court, either in session or in vacation. A more or less lengthened period of time necessarily therefore elapsed before the pursuer could obtain decree, even when, from his failure to enter appearance, it was apparent that the defender could or would offer no defence to the pursuer's claim. Whenever the induciæ have expired without appearance having been entered for the defender, the pursuer may now, without any formal motion or appearance in Court, obtain decree at any time. Decree is of course incompetent before the expiry of the induciæ, and if pronounced entitles the defender to be reponed without finding caution for expenses.[1] Under the provisions of the Act of 1876, it was doubtful how long it remained in the pursuer's power to take decree after the expiry of the induciæ. The Act of 1907 does not dispel that doubt, though from the fact that decree may be taken "at any time after the expiry of the induciæ," it may be inferred that it may competently be taken while the action depends, that is, any time within a year and a day, after which the action falls asleep. Provision is made by the Act of 1907, in terms similar to those contained in the Act of 1876, that where an action has fallen asleep it may be wakened by appropriate procedure.[2] It was held, however, under the provisions of the latter Act, that where a summons or petition is not called within a year and a day from the last diet of compearance, it was at an end and had no existence, and that therefore it could not subsequently be wakened.[3] Under the Act of 1907, no calling of a cause in which appearance has not been entered is necessary, and the cause is not brought before the Court at all. But the *ratio* of the decision seems applicable, and therefore it may be assumed that an action in which no appearance is entered, and in which the pursuer fails to take decree within a year and a day, no longer has any existence.

**2. Amendment of Writ.**—Before taking decree, the pursuer or his agent may be allowed to amend any error or defect in the initial writ, but the Sheriff may, if he see fit, order the amended writ to be served upon the defender, who may appear to defend within such

[1] Downie *v.* Peebles, 1841, 4 D. 117.
[2] Act, Rules 101–3 ; Act, 1876, s. 49.
[3] M'Kidd *v.* Manson, 1882, 9 R. 790.

time as the Sheriff may think proper.[1] The Act of 1876 prescribed that the amendment should be made in writing, either upon the petition or in a separate paper, duly signed by the pursuer or his agent. The Act of 1907 makes no provision as to how the amendment is to be made nor how it is to be authenticated, but the terms of the section seem to imply that it must be made on the writ itself and not by separate minute of amendment; and as the amendment is permissible only with the Sheriff's leave, it should probably be authenticated by his initials. The expense occasioned by the amendment must be borne by the pursuer, and is not recoverable from the defender.

*Effect of Amendment.*—The amendment has not the effect of validating arrestments used on the dependence of the action so as to prejudice creditors of the defender. Thus, where an action, incompetent as originally laid, on the dependence of which arrestments are used, is subsequently amended so as to make it competent, such amendment has not the effect of setting up the arrestment so as to give the pursuer a preference over the other creditors of the defender.[2] But the amendment is operative to the effect of obviating objections to the arrestment when stated by the defender himself, or by any one representing him in title, or in right of a debt contracted by him subsequent to the using of the diligence. That is to say, where the amendment is such as to render competent or relevant an action which was previously incompetent or irrelevant, and on the dependence of which arrestments have been used, the amendment, which thus otherwise would have had the effect of validating an arrestment previously invalid, will not, as in a question with the other creditors of the defender, give the pursuer a preferable claim. But, so far as the defender himself or any one representing him is concerned, he or they will not be allowed to plead that the arrestment previously invalid has not been validated by the amendment. Any diligence competent on the original writ is equally competent on the amended writ.[3]

**3. Extract of Decree.**—An extract of the decree may be issued by the Sheriff-Clerk after the expiry of seven days from the date of the Sheriff's judgment.[4] The lodging of a reponing note does not apparently prevent the issue of an extract. The judgment may

[1] Act, Rule 26; Act, 1876, *sec.* 13.
[2] Fischer *v.* Andersen, 1896, 23 R. 395.
[3] Act, Rule 26; Act, 1876, s. 13.
[4] Act, Rule 24; Act, 1876, s. 14.

be pronounced or signed by the Sheriff when furth of the Sheriffdom, but in that case the date of the interlocutor is the date upon which it is entered in the books of Court.[1]

### (*b*) *Where no Defences Lodged*

If the defender have lodged a notice of appearance, and has not withdrawn it, but fails within the period prescribed by the Act to lodge defences, the pursuer may obtain decree "in respect of no defences." A decree in the Court of Session is "in absence" if pronounced before defences are lodged, the theory being that by his failure to lodge defences the defender has given evidence of the abandonment of his intention to defend the action.[2] The Court of Session Act, 1868, contemplates two kinds of decrees in absence, one where there has been no appearance, the other where there has been appearance but no defences. In each case the cause is "undefended," and the decree pronounced is "in absence." Under the provisions of the Act of 1876, some doubt, which was never authoritatively dispelled, existed as to whether a decree "in respect of no defences" was a decree "in absence" or a decree "by default," but an opinion, which was entitled to great respect, was expressed that nothing in the Act of 1876 made it imperative to treat a decree for failure to lodge defences as a decree by default, the effect of which, it was pointed out, was often to materially increase the defender's difficulty in getting himself reponed. But if the defender himself elected to treat the decree as one by default, there was, it was thought, nothing to prevent him. Thus, in one case a defender, having asked a prorogation for lodging defences, and the Sheriff having refused it and decerned, appealed (without objection) as against a decree by default, and was reponed by the Court of Session.[3] The Act of 1907 seems, however, to dispel, in a sense adverse to the opinion referred to, the doubt formerly entertained. The Act inferentially defines an undefended cause as one in which no appearance has been entered, and a defended cause as one in which it has.[4] And in another clause the Act provides that in all (other than summary) defended causes the pursuer must at the tabling[5]

[1] Act, Rule 83.

[2] Marjoribanks *v.* Borthwick, 1857, 19 D. 474; Mackay's Prac. i. 586.

[3] Bainbridge *v.* Bainbridge, 1879, 6 R. 541. Brown's Trs. *v.* Milne, 1897, 24 R. 1139. *See* Dove Wilson, 4th ed., p. 130, and cases there cited.

[4] Act, Rules 23, 34.

[5] Or within three days.

lodge a condescendence. As the defender does not lodge his defences till six days later, the rule seems clearly to contemplate as a defended action one in which appearance only has been lodged.[1] It further provides, in a section which greatly amplifies the powers conferred by similar clauses under the Acts of 1853 and 1876, that in a defended action where any pleading has not been lodged within the time required by Statute or ordered by the Sheriff, the Sheriff may grant decree as craved with expenses.[2] Such a decree, though perhaps theoretically occasioned by the abandonment of the defender's intention to defend the action, cannot apparently be treated as other than one by default and not merely in absence. The difficulty, therefore, which the defender might have experienced under previous statutory provisions of getting himself reponed against such a decree, if considered to be one by default, is not lessened. The Court of Session, in the exercise of its equitable or common law jurisdiction, may always repone a defender, unless that power have been expressly limited by statute.[3] But in the Sheriff Court, as decrees by default are decrees *in foro*, the defender who fails timeously to lodge his defences, if the view expressed be sound, cannot be reponed at all by the Sheriff-Substitute against the judgment, and must appeal against the interlocutor as against any other final judgment, when of course he may be reponed by the Sheriff or the Court of Session. As the decree is necessarily in terms of the crave contained in the initial writ, subject to any restriction indorsed upon the writ, or set forth by minute, the fact that the decree bears to be " in absence " will not alter its essential character if it be truly a decree " by default."

**4. Extract of Decree.**—Extract of any decree (other than one in absence) which has not been appealed against may be issued in a cause (other than summary) after the lapse of fourteen days from its date, and at such earlier date as the Sheriff shall allow extract.[4]

## II. Reponing against Decree in Absence

**1.** At any time before implement of a decree in absence, the defender may apply to be reponed by lodging with the Sheriff-Clerk

[1] Act, Rules 42, 43.
[2] Act, Rule 56.
[3] Glen *v.* Thomson & Stewart, 1901, 4 F. 154.
[4] Act, Rule 85; Act 1876, s. 32.

and serving upon the pursuer a note setting forth his "proposed" defence, and his explanation of his failure to appear.[1] The Act does not in any way define what is meant by a proposed defence, nor does it afford any explanation of the apparently unnecessary provision that before consenting to repone a defender against a decree obtained in his absence, the Sheriff should be made aware of the defence the defender proposes to lodge. In any event, as the pursuer's condescendence cannot have been lodged at the time when the defender lodges his reponing note, it is not easy to understand how the defender can state a defence to averments and statements which he has never even seen. Along with the reponing note, the defender must consign the sum of £2 in the hands of the Sheriff-Clerk, which, whatever happens, the pursuer is entitled to uplift.[2] Upon the consignation being effected, the Sheriff, if satisfied with the defender's explanation, may recall the decree so far as not implemented, the action thereupon proceeding in all respects as if the defender had appeared.[3] If, however, the Sheriff is not satisfied with the defender's explanations, he may refuse the reponing note.[4] No distinction is now drawn, as in the Act of 1876, between applications to be reponed within and after seven days from the date of decree. Under the provisions of that Act, the defender was entitled of right to be reponed against a decree in absence, provided within seven days from the date of decree he consigned the sum of £2 and that he lodged his defences. On the expiration of the seven days he was entitled, not of right but in the discretion of the Sheriff, to be reponed against the decree, so far as it remained unimplemented, on condition that he consigned £5 and presented a written note explaining his failure to enter appearance and to take timeous steps to have the decree recalled, producing at the same time his defences and any documentary evidence in support of his explanations.[5] Under these provisions, as under those of the Act of 1853, the Sheriff had no option in reponing a defender, if the application were made within the seven days, nor in refusing to receive defences, however irrelevant or dilatory they might prove to be. Now, however, in all cases the defender's right to be reponed against a decree in absence is purely conditional upon the reason-

[1] Act, Rule 27.
[2] Act, Rules 28, 31.
[3] Act, Rule 29.
[4] Act, Rule 30.
[5] Act, 1876, s. 14 (1, 2, 3).

ableness of the explanation he offers of his failure to lodge the notice of appearance within the statutory period, and of the relevancy of the defence which he proposes to state. The explanation must be such as to "satisfy" the Sheriff, but if it does not do so, it is not incumbent (nor, judging from the decisions with reference to other cases where the Sheriff's "satisfaction" is required, is it proper) for the Sheriff to assign reasons for his want of satisfaction.

**2. Sist of Diligence.**—In all cases the reponing note must be intimated by service to the pursuer or his agent, and when so duly intimated it operates as a sist of diligence.[1] A copy of the note may be sent by registered letter, addressed to the pursuer or his agent, in the same way and according to the same rules as obtain in the case of service of the initial writ. As intimation is made to the pursuer, there seems to be a presumption that the Act intended that he should have an opportunity, if so advised, of appearing and stating objections *viva voce* to the reponing note.[2]

**3. What constitutes Implement.**—The Sheriff may recall the decree so far as not "implemented." As extract of the decree cannot be issued till the expiry of seven days from the date of the Sheriff's judgment, no implement of the decree can take place during that time. A decree is implemented whenever the property or person of the debtor has been taken in execution of the debt, as when a poinding has taken place under it, whether the poinding have been reported to the Clerk of Court, or whether a warrant to sell the poinded effects have been granted or not.[3] It is also implemented when the person of the debtor has been incarcerated.[4] It is not, however, probably implemented by an arrestment which is not followed up by an action of furthcoming.[5] The expression "so far as not implemented" seems to mean that whatever benefit the pursuer may have secured under his decree, such as a payment to account of the debt or an instalment under a decree for payment by instalments, cannot be taken from him, but that the lodging and intimation of the reponing notes gives the

[1] Act, Rule 32.

[2] *See* Smith *v.* Inglis, 1881, 18 S.L.R. 563.

[3] *See* Stephenson *v.* Dobbins, 1852, 14 D. 510; Anderson *v.* Anderson, 1855, 17 D. 804; Rowan *v.* Mercer, 1863, 3 Irv. 377.

[4] Maclachlan *v.* Rutherford, 1854, 16 D. 937.

[5] *See* Paul *v.* Macrae, 1886, 3 S.L.Rev. 338 (Sh. Ct.).

defender an opportunity of disputing his liability for any further payment.[1]

**4. Decree Final.**—An interlocutor or order upon a reponing note, or recalling or incidental to the recall of a decree in absence, is final and not subject to review.[2] An interlocutor *refusing* to recall being a final judgment, may, if otherwise competent, be appealed, but the Sheriff's discretion in refusing to recall a decree in absence will not readily be interfered with.[3]

**5. Decree equivalent to Decree *in foro*.**—A decree pronounced in absence, and which has not been recalled or brought under review by suspension where suspension is competent, or by reduction, becomes final, and is entitled to all the privileges of a decree *in foro* (*a*) in six months from its date, or from the date of the charge under it, where the service of the writ or of the charge has been personal, or (*b*) in any event after the lapse of twenty years from its date.[4] This provision differs materially from the corresponding provision not only in the Sheriff Court Act of 1876, but in the Court of Session Act of 1868, upon which the Act of 1876 was largely modelled. Under the provisions of the Act of 1876, a decree in absence was entitled to the privileges of a decree *in foro* only after the lapse of twenty years if the decree were one on which a charge was *not* competent, the actions on which a charge was not competent, such as those of declarator or interdict in which there was no decerniture for expenses, being of comparatively infrequent occurrence. And such decrees were moreover entitled to the privilege only if service on the defender had been personal, or the entering of appearance for him had been authorised. Decrees on which a charge *was* competent were entitled to the privilege after the lapse of six months from the date, not of the decree, but of the charge upon it. Under the Act of 1907 it is apparent that *any* decree in absence, whether a charge upon it is competent or not and whether a charge have been given upon it or not, is entitled, if not suspended or reduced, to the privilege of a decree *in foro* upon the expiration of six months from its date (or, if a charge has been given upon it, of six months from the date of the charge), if service

[1] *See* M'Eachran *v.* Terry, 1885, 1 S.L.Rev. 237 (Sh. Ct.).

[2] Act, Rule 33; Act, 1876, s. 14 (4).

[3] *See* Smith *v.* Inglis, *sup.*; Nicol *v.* Johnston, 1888, 26 S.L.R. 61; Act, Rule 86.

[4] Act, Rule 25; Act, 1876, s. 15; *see* Bryson *v.* Belhaven, etc., Motors Ld., 1908, 15 S.L.T. 1043.

of the writ (or charge) has been personally made upon the defender. If service has not been personally made upon the defender, the decree is, in any event, entitled to the privilege after the lapse of twenty years from its date.

**6. Effect of Decree** *in foro*.—A decree *in foro*, which includes all kinds of decrees except those in absence, forms *res judicata* between the parties as to the question or questions decided, and, unless brought under the review of the Supreme Court within the time competent and in a competent manner, are absolutely final and cannot be impugned in any subsequent action either by the parties or their representatives. Review of decrees *in foro* which have become final may be obtained by suspension, where suspension is competent, or reduction in the Court of Session, provided the privative jurisdiction of the Sheriff Court is excluded by reason of the value of the question in dispute being above £50.

# SECTION IV

## PROCEDURE IN DEFENDED ACTION

# CHAPTER X

## INITIAL PROCEDURE

### (*A*) Entering Appearance


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### (*C*) The Pleas in Law


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### (*A*) Entering Appearance

**1. Notice of Appearance.**—If a defender intend to state a defence, he must (except in summary causes), before the expiry of the induciæ, lodge with the Sheriff-Clerk a notice of appearance in the form prescribed by the Act.[1] The language of the Statute is peremptory, and, notwithstanding the provisions of section 56, by virtue of which the Sheriff may upon cause shown prorogate the time for lodging any production, it does not therefore appear to be competent to lodge a notice of appearance after the expiry of the induciæ. The moment the induciæ expires the pursuer may, if no notice of appearance have been lodged, obtain decree in terms of the crave. If, however, before the defences were due, the defender so desired, he might, under the provisions of the Act of 1876, withdraw

[1] Act, Rule 26; Act, 1876, s. 13.

his notice of appearance, the effect of which was to place him in the same position as if appearance had not been entered. A decree pronounced after the notice of appearance was withdrawn was still a decree in absence. But, under the provisions of the Act of 1907, a cause in which a notice of appearance is entered becomes at once a defended cause and is enrolled by the Sheriff-Clerk for tabling on the first Court day occurring after the expiry of the induciæ. It would appear that once the cause has become a defended cause, it cannot, even with the pursuer's consent, again become undefended, even if no defences have actually been lodged; and if that be so, it follows that once a defender has lodged a notice of appearance he cannot, even with the pursuer's consent, withdraw it, so as to enable the pursuer to obtain decree in absence, and he must therefore perforce allow the pursuer, through his failure to lodge defences, to obtain a decree by default. As has been seen, he may, on appeal against such an interlocutor, though not by reponing note, be reponed on payment of all expenses incurred. In practice, the difficulty, which is real and not merely technical, may be surmounted by obtaining special leave from the Sheriff, on such conditions as he may see fit to impose, to allow the withdrawal of the notice of appearance, though there is no statutory warrant for such a proceeding.

**2. Tabling of Cause.**—Where appearance has been entered, the Sheriff-Clerk must enrol the cause for tabling on the first Court day occurring after the expiry of the induciæ.[1] The Act of Sederunt of 1839 provided that a summons should be "called" upon the day the induciæ expired, if a Court day, or if not, upon the first Court day thereafter, at which diet the defender was bound to produce his defences.[2] The Act of 1876 assumed that the cause should be called on the first Court day occurring after the expiry of the induciæ, since it provided that on that day, or at latest at an adjourned diet not later than seven days thereafter, the defender was bound to lodge his defences with the Sheriff-Clerk.[3] But no provision was made which compelled the pursuer to call the cause on that or any other day, and it was left to his discretion to select the day, and, where there was more than one judge, the particular Sheriff before whom he desired the cause to depend. If the pursuer delayed or neglected to call the cause, the defender had his remedy

[1] Act, Rule 34.
[2] A. S. 1839, ss. 23, 29.
[3] Act, 1876, s. 16.

by craving protestation. But under the provisions of the Act of 1907 the selection of the day on which the case is to be tabled, and the particular Sheriff before whom it is to depend, is excluded from the pursuer's power, and the cause is necessarily enrolled for tabling on the first ordinary Court day either in session or in vacation which occurs after the expiry of the induciæ. The Act does not, however, make any provision by which the Sheriff-Clerk may be enabled to ascertain the day on which the induciæ expire, but in practice it is understood the Sheriff-Clerk requires production of the service copy of the initial writ along with the notice of appearance, and thus obtains the necessary information. The tabling must be effected by the hand of the pursuer, his agent, or his agent's clerk, at the diet for which the cause is enrolled. It appears, therefore, to be clear that the tabling should be effected by placing the initial writ upon the table of the Court, either at the commencement of the diet, *i.e.* when the Sheriff takes his seat upon the bench, or when the case is called in Court. If the action is actually tabled at the diet before the case is called, the requirements of the Act appear to be sufficiently complied with. But to obviate the possibility of the Sheriff-Clerk failing to notice the fact, he should be informed. If he is informed, and *per incuriam* the pursuer's agent fails to hear the calling of the case, and as a consequence the defender proceeds to crave protestation, it would appear to be the duty of the Sheriff-Clerk to inform the latter that tabling has been effected in terms of the Statute. If the pursuer does not table the cause, the defender may crave protestation; but if he do not, the cause drops from the roll, though it may, within three months, be restored to the roll under such conditions as to notice, re-service, expenses, or otherwise as the Sheriff may see fit to impose.[1]

**3. Protestation.**—If the pursuer do not table the cause on the day on which it appears on the roll for tabling, the defender or his agent, upon producing the service copy of the writ, may crave protestation for not insisting, which the Sheriff may grant, and may further modify the amount of protestation money payable to the defender.[2] The protestation money is a sum awarded to the defender as remuneration for his trouble and expense. Under the former procedure, protestation was the only mode of reaching a pursuer who hung back without appearing in the earlier stages of a

[1] Act, Rule 35.

[2] *Ibid.*, 36; A. S. 1839, s. 25.

cause, since no provision was made with regard to actions in the Ordinary Court, as existed in the case of actions in the Small Debt Court, by which a petition which a pursuer had failed to support could be summarily dismissed in absence. If the defender did not crave protestation, the pursuer was free to keep the action hanging over his head until from the lapse of time it fell asleep. Since, until the pursuer chose to enrol the cause, it never appeared upon the rolls of Court, it could not of course be dropped. Under the Act of 1907, however, even if the defender do not crave protestation, the action falls if it is not duly tabled, and can only be restored to the roll presumably on a motion to that effect made by pursuer, subject to any conditions which the Sheriff may impose. But it would appear that under the provisions of the Act the defender may, instead of allowing the action simply to drop from the roll, move either for dismissal of the action or for decree of absolvitor. The Act provides[1] that in a defended action (which it would appear is one in which appearance has been entered[2]), when any pleading has not been lodged within the time required by Statute, or either party fails to appear by himself or his agent at any diet, the Sheriff may grant decree of absolvitor or may dismiss the action with expenses.[3] The pursuer, it is provided, must at the tabling of the cause (or within three days thereafter) lodge his condescendence and note of pleas in law. As the tabling takes place on the first Court day after the expiry of the induciæ, it must apparently take place in Court and therefore at a diet in the cause; it would accordingly appear competent for the Sheriff to dismiss the action or to grant decree of absolvitor if the pursuer fail to attend at the tabling, either by himself or his agent. Again (since it can hardly be doubted that the condescendence is a "pleading"), if the condescendence be not lodged either at the tabling of the cause or within three days thereafter, the action may be dismissed or decree of absolvitor granted. The provisions of the Act may therefore be summarised thus: The pursuer must table the cause at the first Court day occurring after the expiry of the induciæ. If he do not do so, the defender may crave protestation, or he may move for decree of dismissal or absolvitor, which the Sheriff may or may not in his

[1] Rule 56.
[2] *See supra.*
[3] Act, Rule 56; *see infra*, Chapter XXI., Failure to lodge Productions and Pleadings.

discretion grant. If no order is made, the action drops from the roll. If the action drops from the roll, it may be restored within three months on certain conditions. At the tabling, or within three days thereafter, the condescendence must be lodged. If it be not lodged within the statutory period, the action may be dismissed or decree of absolvitor granted. At the diet for the tabling of the cause, the pursuer must appear by himself or his agent. If he fail to so appear, the action may be dismissed or absolvitor granted. The use of protestation may therefore be expected to become even more rare than it formerly was.

**Extract of Protestation** cannot be granted till the expiry of seven free days from the date of its granting, except where arrestments are used, in which case extract may be given out after the lapse of forty-eight hours.[1] If the protestation be extracted the instance falls, the effect of extract therefore being equivalent to a dismissal of the action.[2] Before extract the protestation may be recalled, and the pursuer may be allowed to proceed with his action upon making payment to the defender of the amount of the protestation money and upon such other conditions as the Sheriff may think just.[3] The extract contains a precept of poinding and arrestment for recovery of the protestation money and the dues of extract.

### (*B*) The Condescendence

**Time for Lodging.**—The pursuer must lodge his condescendence, with the relative pleas in law, at the tabling of the cause or within three days thereafter.[4] The statutory provisions are based on the assumption that the preparation of a condescendence is unnecessary except where the action is defended. The defender is not of course obliged to lodge his notice of appearance till the last minute of the last day of the induciæ. As the cause is enrolled for tabling on the first Court day occurring after the expiry of the induciæ, it follows that the date for tabling may be the day following the lodging of the notice of appearance. The pursuer, therefore, if he desire the utmost expedition, will have the condescendence ready for lodging when he tables the cause; otherwise he has three days in which to prepare it and lodge it.

[1] Act, Rule 37; A. S. 1839, s. 26.
[2] Act, Rule 38; A. S. 1839, s. 28.
[3] Act, Rule 39; A. S. 1839, s. 27.
[4] Act, Rule 42.

**The Statutory Directions.**—The condescendence must set forth succinctly and in articulate articles the grounds of action.[1] The similar provision in the Act of 1876 required that the grounds of action should be contained in a statement (in the form of an articulate condescendence) made succinctly, and without quotation from documents except where indispensable. But under that Act the condescendence was a part of the initial writ which was served upon the defender. Under the provisions of the Act of 1907, the initial writ must contain a statement of the "general nature" of the pursuer's claim or demand, while the condescendence, which the defender sees for the first time after he has entered appearance, is required to state succinctly the "grounds of action." What constitutes a succinct yet complete statement of the grounds of action must obviously depend largely, if not entirely, on the nature of the particular cause. But the condescendence must in the first place set forth the grounds which constitute the pursuer's title to sue, and, in the second place, it must contain a statement, divided into paragraphs numbered consecutively, of the material facts on which the pursuer relies to establish his claim or demand, but not the evidence by which they are to be proved.[2] In other words, the pursuer must have in view in the preparation of his condescendence the precise issue which he desires to try, and he must embody in his statement only such materials as are directly pertinent to that issue.[3] The statements in the condescendence should therefore be as *short and precise* as is consistent with intelligibility, and they should be *articulate*, each proposition being contained in a separate and distinct article. But they must be *sufficient*, not only to enable the pursuer to establish his claim by competent evidence, but to lay an adequate foundation for the admission of such evidence. They must, in other words, be sufficiently comprehensive to enable the pursuer to lead *all* the evidence necessary to establish his claim, and to give the defender such warning as will enable him to meet the case the pursuer intends to establish against him. In the third place, the averments contained in the condescendence must be *relevant*, not merely as *pertinent* to the issue, but as *sufficient* to warrant decree in the pursuer's favour on the assumption that they are, or can be proved

[1] Act, Rule 42.

[2] *See* English Sup. Court Rules, 1883, Order 19, Rule 4.

[3] Burden *v.* Mitchell, 1856, 18 D. 339, *per* Ld. Pres. M'Neill.

to be, true. They must not, therefore, be vague or ambiguous; they must be specific and they must be consistent. If the pursuer base his claim on averments which are inconsistent, he must, before the record is closed, decide on which averments he elects to go to proof, or otherwise the action will be dismissed.[1] Where fraud is averred, *e.g.* the precise nature and extent of the fraud must be disclosed. In actions of slander, the *ipsissima verba* constituting the slander must, if possible, be given; and if the slander be uttered under circumstances which make the occasion of its utterance privileged, the fact that the defender uttered it maliciously and without probable cause must be averred. If the words complained of are not in themselves slanderous, the innuendo which in the pursuer's opinion they were intended to convey, and which makes them defamatory, must be stated. Similarly, where damages are claimed in respect of the defender's fault or negligence, or that of some one for whom he is responsible, the precise nature of the fault or negligence and the name of the culpable person must be specified. In actions arising *ex contractu*, the nature of the contract must be specified, and if it be intended to sue not only upon the contract but upon the debt constituted by it, the debt should be specifically condescended on. In actions of damages generally, the precise details of the specific damages which in the aggregate make up the amount of pursuer's claim should be specified. In claims arising in virtue of an Act of Parliament, it is necessary to specify both the Act and the section applicable.

**Documents founded on.**—Along with the condescendence (or at latest before the closing of the record) the pursuer must, if required either by any other party to the action or by the Sheriff, lodge any documents founded on by him, so far as they are within his custody or power.[2] Whether they are founded on or only incidentally referred to, they should not, it is thought, be quoted *ad longum* except where such a course is absolutely indispensable. The occasions on which the quotation of documents founded on or referred to is permissible, except in the briefest terms, are very rare. But such documents must be accurately and clearly specified, and where, as in a contract or a discharge, they constitute the vital essence of the case, their tenor or even their most salient terms may

[1] M'Sourley *v.* Paisley Mags., 1902, 10 S.L.T. 46 (O.H.).

[2] Act, Rule 47.

often with advantage be summarily stated. Where such documents are in the hands of third parties, the Sheriff may, on the motion of either party, grant a commission and diligence for their recovery.[1]

### (*C*) The Pleas in Law

Along with the condescendence the pursuer must lodge his pleas in law.[2] Under the Act of 1876, and all prior Acts, the pursuer was directed to lodge along with his condescendence a "note" of his pleas in law. From the absence of the word "note" it cannot be inferred that the Act contemplates that the pleas in law should be stated otherwise than as briefly and succinctly as circumstances permit. The pleas in law are enunciations of distinct legal propositions, specifically applicable to the circumstances of the case, which when taken along with the facts averred in the condescendence substantiate the pursuer's right to decree in the terms craved. Abstract legal propositions are not pleas in law; nor is a statement that in the circumstances condescended on the pursuer is entitled to decree. The facts averred, stated with brevity and assumed to be true or capable of proof, should be connected to a statement equally brief of the legal consequences which necessarily follow. Thus, to take the simplest example, a good plea would be one which stated that the defender being due and resting owing to the pursuer the sum sued for, decree with expenses should be granted as craved. But certain pleas are commonly used in an abbreviated form, and well understood in practice, such as "The action is irrelevant," "No jurisdiction," "No title to sue," and "All parties not called," and the practice is a convenient one. Pleas should not be multiplied unnecessarily, and should be confined strictly to such as have a direct bearing on the decision of the case or upon the mode of proof by which that decision is to be arrived at. They should, like the statements in the condescendence, be articulate, each plea being self-contained and complete in itself. But they may conflict with each other, in which case the second plea is usually prefaced by the word *separatim*. They are not necessarily stated in any particular order or sequence. But, logically, pleas which, on the assumption that the facts averred in the condescendence are proved or admitted, would justify a decision in the pursuer's favour, should first be stated;

[1] Act, Rule 48.

[2] Act, Rule 42.

then those which meet or are designed to meet the objections which the defender may reasonably be expected to advance against the pursuer's averments, or to the mode in which he intends to prove them; and lastly, those which are destructive, obstructive, or dilatory with reference to the defence, or restrictive as regards the mode by which the defender is expected to establish it.

**Amendment of Pleas.**—Though the Sheriff is bound to do justice as between the parties to the effect of determining the real question in controversy, he is not generally entitled *ex proprio motu* to give effect to a plea which has not been stated.[1] He may now, however, *ex proprio motu*, and before the closing of the record, order a revisal of the pleadings,[2] to the effect presumably of enabling a pursuer to add a plea which he has omitted, but on which the decision of the cause may turn. And he may, in any event, on the motion of the pursuer, at any stage of the cause, and upon any conditions as to expenses, re-service, or otherwise, allow the record (including the pleas in law) to be so amended or altered as to enable him to determine the real question in controversy.[3]

**Signature of Pleas.**—No provision is made by the Act of 1907 that either the condescendence or the pleas in law shall be signed by the pursuer or his agent. It is apparently only the initial writ which must necessarily be so signed, but in practice the pleas will probably be attested by the signature of the pursuer or his agent. The Act of Sederunt of 1839, section 63, provided that all "pleadings" should be subscribed by the party or his agent, and although this provision has not been incorporated in the Act of 1907, it would appear a safe rule to follow, there being nothing in the Act to prevent its adoption.

NOTE.—*Provided the Pursuer chooses to run the risk of having the expense disallowed in the event of the action being undefended, there does not appear to be anything in the Act to prevent him annexing his condescendence to the initial writ (or petition) and referring in the preamble to the condescendence for particulars, as,* e.g. "*The Pursuer's claim is for payment of £ as damages arising as mentioned in the annexed condescendence.*" *Such a course, if adopted, would lead to a saving both of trouble and expense.*

[1] *See* Brown *v.* Anderson, 1837, 9 Jur. 449; Robb *v.* Logiealmond School Board, 1875, 2 R. 417.

[2] Act, Rule 49; *see* Act, 1876, s. 17.

[3] Act, Rule 79.

# CHAPTER XI

## THE DEFENCES

### (*A*) The Defences


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### (*A*) The Defences

**Time for Lodging.**—Defences must be lodged within six days of the lodging of the condescendence.[1] The condescendence must be lodged within three days after the tabling of the cause, which in the ordinary case means that the defences must be lodged within, as a rule, sixteen days from the date of the service of the initial writ. Under the provisions of the Act of 1876, the defences required to be lodged with the Sheriff-Clerk on the day the case was called in Court, or at the latest at an adjourned diet not later than seven days thereafter. The language of the Statute, which was far from explicit, apparently required that defences should be lodged before the expiry of the day the case was called, unless the defender on that day obtained a deliverance fixing a diet for the purpose on a future day, which, however, was to be within seven days. The provisions of the Statute were, however, generally found inconvenient in practice, though, owing to

[1] Act, Rule 43.

the provisions whereby the time for lodging defences might on cause shown be prorogated, some mitigation of the severities of the statutory directions was possible.[1] No special provision is made by the Act of 1907 whereby the time for lodging defences may be extended beyond the statutory period; but the Sheriff has power, under the provisions of the Act, upon cause shown, to prorogate the time for lodging any document or pleading where such a course is necessary in the interests of justice.[2] It is irregular for a defender who has failed to lodge defences to afterwards appear in the process by lodging a minute.[3] Where the authority of the agent to defend the action is disputed, or where the authority of a party defending an action on behalf of himself and others is disputed, time will be given to permit of the production of a mandate.[4]

**Form of Defences.**—Defences must be in the form of articulate answers to the condescendence, having appended a note of defender's pleas in law, and, where necessary, a statement of the facts founded on in defence, which must be set forth succinctly.[5] The rules which apply to the framing of the condescendence apply *mutatis mutandis* to the framing of the defences. The articles of the defence must specifically meet the corresponding articles of the condescendence, and each answer should specifically admit or deny, either unreservedly or subject to explanation, the averments to which it is an answer.[6] Every averment made by the pursuer which the defender has an opportunity of admitting or denying, and which he does not deny or refuse to admit, is held to be admitted by him;[7] but facts which are bound admittedly to be within the defender's knowledge, such, for example, as the fact that an I. O. U. founded on by the pursuer is holograph of the defender, must be either admitted or denied categorically, a mere refusal to admit their truth being held as an admission of it.[8] The answers, therefore, must be neither

[1] *See* Act, 1876, s. 19; Act, 1853, s. 6; Bainbridge, 1879, 6 R. 541; Nicol *v.* Johnstone, 1888, 26 S.L.R. 61; Dove Wilson, 4th ed., pp. 141–3.

[2] Act, Rule 56. *See* Bainbridge, *sup.*; Nicol *v.* Johnstone, *sup.* This question is dealt with later, Chap. XXII.

[3] Campbell *v.* Ayr County Council, 1905, 13 S.L.T. 193 (O.H.).

[4] Fischer *v.* Anderson, 1896, 23 R. 395.

[5] Act, Rule 46; Act, 1876, s. 16.

[6] *See* A. S. 1839, s. 32.

[7] *See* N.-E. Rly. Co. *v.* Napier, 1859, 21 D. 700.

[8] Peagler *v.* Nor. Agric. Impl. Co., 1877, 4 R. 435; Ellis *v.* Fraser, 1840, 3 D. 264; Swan *v.* Craig, Guthrie's Sel. Ca. i. 51.

ambiguous nor evasive. Thus, for example, an averment that the pursuer lent the defender the sum of fifty pounds is not sufficiently answered by the word "denied," if as matter of fact what the defender desires to deny is not the fact of the loan itself, but the actual amount which the defender received. If that be his intention, he ought to admit the fact of the loan and make an explanation with reference to its amount. Similarly, an averment that defender slandered pursuer by calling him "a liar and a thief," should be met with a denial that pursuer was called *either* a liar *or* a thief, or an admission that he was called one but not the other of the defamatory names.[1] Where an answer partially admits and partially denies an averment of the pursuer, the defender must exercise care to see that the matter admitted is clearly separated from that denied. He ought, according as the major part of the averment is admitted or denied, to admit certain facts and state that *quoad ultra* the averment is denied, or he should deny the facts and state that *quoad ultra* the averment is admitted. Where, however, the defender finds it convenient or necessary to append a statement of facts, as he believes them, to his answers, he may appropriately admit or deny an averment "subject to," or "so far as consistent" or "inconsistent with," the facts so stated, though such a form of pleading is open to the serious objection that its use may lead to the admission of statements which, while not "inconsistent" with the pursuer's averments, are actually destructive of the defender's case.[2] An admission which is qualified by an explanation must be taken along with the qualification, unless the explanation itself can be disproved.[3] But the qualification will not be held to be disproved where, on a reference to his oath, the party founding on the admission denies the facts upon which the qualification is based.[4] And an admission qualified by a statement which is supported by no relevant averment falls to be treated as an unqualified admission. Thus, where a defender admits that a sum of money is resting-owing, and qualifies his admission by stating that he has a counter-claim against pursuer, which he supports by no relevant averment, he is held to have

[1] *See* Eng. Sup. Court Rules, 1883, Order 19, Rule 19. Stephen on Pleading, 211.

[2] Andersons *v.* Low, 1863, 2 M. 100.

[3] Grierson *v.* Thomson, 1830, 8 S. 317; Campbell *v.* Arnot, 1835, 13 S. 557; Gelston *v.* Christie, 1875, 2 R. 982.

[4] Chrystal *v.* Chrystal, 1900, 2 F. 373.

admitted the resting-owing of the debt without qualification.[1] So, when a person admits the receipt of money on deposit or loan, and qualifies that admission by an averment that the money was repaid, without being able to substantiate his averment by corroborative evidence, his admission falls to be treated as though it were wholly unqualified, the *onus* of proving repayment of a sum admittedly received resting on him.[2] An admission must be construed fairly, and not distorted so as to make it capable of a meaning which was never intended.[3] Counter averments should in most cases be reserved for the defender's statement of facts.

The rules as to the sufficiency of the averments apply equally to the defences as to the condescendence, and the notice or warning of facts on which the defender relies to defeat the pursuer's claim must be such as to afford the defender an adequate basis for leading such proof as may establish his defence. Thus, in actions where, for instance, such a defence as that of *alibi* is relied on, the place and the persons with whom defender actually was at the time libelled must be stated, so that the pursuer may have an opportunity of leading proof to rebut the defender's averment. Similarly, in actions of damages for defamation, the defender may competently plead that the defamatory words were not uttered, but that, if they were, they are true, either averment, if proved, entitling the defender to absolvitor. But it is an established rule of pleading that unless the defender specifically undertake to justify the statement complained of, specifying precisely, in a statement which substantially meets and covers the alleged slander, the facts and particulars which he intends to prove, he cannot afterwards lead evidence in justification of the slander even to the effect of mitigating damages.[4] On the same principle, where the defender intends to meet the pursuer's case by preliminary pleas, such as want of jurisdiction or of title to sue, he must be careful in his defences to lay a foundation sufficient to enable him to substantiate them.[5] All grounds of defence, both dilatory and peremptory, must be stated at once.[6] There is no

[1] Robertson & Co. *v.* Bird, 1897, 24 R. 1076; *see* Coghill *v.* Coghill, 1896, 4 S.L.T. 310 (O.H.).

[2] Taylor *v.* Nisbet, 1901, 4 F. 79.

[3] *See* Cruikshank *v.* Cal. Rly. Co., 1876, 3 R. 484.

[4] *See* Paul *v.* Jackson, 1884, 11 R. 460; Bertram *v.* Pace, 1885, 12 R. 798; Fletcher *v.* Wilson, 1885, 12 R. 683.

[5] N. B. Rly. Co. *v.* Brown, Gordon & Co. 1857, 19 D. 840.

[6] Thorburn *v.* Dempster, 1900, 2 F. 583.

incompetency in pleading inconsistent grounds of defence, such as denial of the resting-owing of a debt and its prescription, but care must be exercised to ensure that the facts averred are pleaded alternatively, since otherwise the defender runs the serious risk of having one or other of his averments treated as an admission. Where there are more defenders than one, all may unite in a single defence, or each may lodge a separate defence for himself, adopting or repeating the defence stated by the leading defender. But a repetition of a defence stated by another defender is improper, as is a separate defence, which merely states that such defences as may be lodged by one or other of the remaining defenders is referred to or adopted.[1] Separate actions against different defenders require separate defences, though the grounds of defence in each case are the same.[2] A defender may competently lodge a minute withdrawing his defence, whereupon the Court will receive it and grant decree as craved.[3]

**Statement of Facts.**—There is no fixed practice as to the cases in which it is proper or incumbent on the defender to make a separate statement of facts. The statement should, however, be made only where "necessary," which in other words practically means "expedient." Thus it may be properly made where the averments of the pursuer, whether admitted or denied, do not exhaust the facts of the case so far as they are, in the judgment of the defender, material to the decision of the cause. And while explanations or qualifications of the pursuer's averments may properly and competently be made in the defender's answers, separate averments of facts should be reserved for inclusion in a separate statement of facts. But such explanations or qualifications should never be the result merely of a desire to save trouble. The statement of facts may also properly be resorted to for the purpose not of stating facts not already averred by the pursuer, but of stating the same facts devoid of the erroneous colouring imparted to them by the pursuer's statement. A separate statement is also proper where the defence amounts practically to the statement of a separate case or counterclaim, or where the defender relies on material facts which he

[1] Richardson *v.* Gavin's Trs., 1851, 14 D. 279; Bett *v.* Arnott, 1828, 6 S. 1032, *note*.

[2] Cowie *v.* Merry, 1828, 7 S. 23; Richardson *v.* Gavin's Trs., *sup.*

[3] Owen *v.* Crichton, 1902, 10 S.L.T. 279 (O.H.).

desires the pursuer to answer categorically. As the statement of facts is practically a "condescendence" for the defender, the rules applicable to condescendences proper apply to them.

*Pursuer's Answer to Defender's Statement.*—The Sheriff may, either upon cause shown or *ex proprio motu*, order the pursuer to answer defender's statement of facts.[1] Formerly, a pursuer was not bound, and could not be compelled, to answer the defender's statement, even when by his statement the defender put an entirely new complexion on the facts of the case as stated by pursuer.

**Counter-claims.**—Where the defender pleads a counter-claim, it is sufficient if he state it in his defences. The averments, however, which support the counter-claim ought to be as clear and specific as those which contain the defender's denial of the pursuer's claim. Under the practice existing prior to the Act of 1907, where the defender's counter-claim exceeded the claim of the pursuer, he might, if he succeeded in establishing his defence, obtain decree of absolvitor in respect of the claim made against him, but he could recover the amount by which his counter-claim exceeded the pursuer's claim only by raising a substantive cross-action. Under the provisions of the Act of 1907, the Sheriff may deal with a counter-claim as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on.[2] The Sheriff may therefore decide in favour of either or both of the parties. Thus, if a person sue another for £100, and the defender avers a counter-claim amounting to £150, the Sheriff may hold that pursuer has failed to substantiate his claim altogether, and that defender has proved his counter-claim, in which case he would grant decree against the *pursuer* for £150. Or he might, on the ground that both parties had proved their respective claims, grant decree against the *pursuer* for £50. The Act does not expressly so provide, but it may perhaps be assumed that the two claims must be *ejusdem generis* or arising out of the same subject-matter. Thus, where defender is sued for damages estimated at the sum of £100 in respect of a slander uttered against the pursuer, it would probably be competent for the defender to plead that the pursuer was due him a sum of money, more or less than the amount of the claim as the case might be, in respect of a loan, whether the utterance of the slander had or had not any connection with the loan. In each case the

[1] Act, Rule 49.

[2] Act, Rule 55.

claim is *ejusdem generis*, being for a sum of money. And the same rule holds where a pursuer, suing (say) for the amount contained in a bill of exchange or promissory note, is met by a counter-claim that he is due the defender a sum of money by way of damages for slander. It would certainly appear anomalous to permit the setting up of a counter-claim which neither arises out of the subject of the claim nor is *ejusdem generis* with it, as for instance (to take a glaring example) to permit a proof of a counter-claim for a sum of money in an action *ad factum præstandum*. The Act provides that the Sheriff *may* deal with a counter-claim as if it were a substantive action: it does not, however, provide that he *must* so deal with it, nor does it make any provision for the case where in the exercise of a hypothetical discretion the Sheriff refuses to deal with a counter-claim in the manner prescribed. What happens if, in such circumstances, the pursuer abandons his case? Are the defender's averments in support of his counter-claim entitled to be treated precisely as though they were substantive averments made in an action in which the position of the parties as pursuer and defender respectively is reversed? It would appear that such a construction of the provision is not one contemplated by the Legislature, the apparent intention of which was merely to obviate the inconvenience previously experienced, which was occasioned when a defender who had a valid counter-claim against the pursuer's claim was forced to raise an independent action for the amount. The counter-claim, it would seem, on a fair construction of the statutory provisions, is entitled to be treated in the manner prescribed only so far as and while it exists by way of defence to the pursuer's claim, and when that claim is abandoned the counter-claim falls with it, at least in so far as relates to the action in which it is stated. The defender's remedy, as under the previous law, is to raise an independent action. In any event, the expediency of setting up a counter-claim in a case in which the defender has reasonable assurance that the pursuer will fail to establish his claim, is a matter for consideration, since, where the pursuer is impecunious, the setting up of such a claim and the consequent prolonging of the case may simply end in involving the defender in needless expense. And there are circumstances in which it is conceivable that the defender might best serve his ends by reserving the statement of his counter-claim and bringing a substantive action for its amount against the pursuer.

### (*B*) Defender's Pleas in Law

The defences have appended to them a note of the pleas in law in respect of which the defender hopes to obtain a decree in his favour either of absolvitor or of dismissal of the action. Defences, and their relative pleas in law, are of two kinds, dilatory or preliminary and peremptory or on the merits. A preliminary defence if sustained, entails either the dismissal or the sist of the action, the proper form of decree being either to dismiss (or sist) the action or assoilzie the defenders from its conclusions *as laid*. The pursuer is thus not precluded from raising a new action on different grounds.[1] A defence on the merits, on the other hand, if sustained, entitles the defender to a decree of absolvitor and forms *res judicata* as between the same parties in respect of the subject in dispute. The principal preliminary pleas are (1) Declinature of the judge[2]; (2) No jurisdiction[3]; (3) Objections to execution of citation[4]; (4) No title to sue; (5) All parties not called; (6) Action is incompetent or (7) irrelevant; (8) *Lis alibi pendens*; and (9) *Forum non conveniens*.[5]

*No Title to sue.*—Where the defender pleads that the pursuer has no title or no interest to sue, he must specify in his defences the precise nature of his objection to the pursuer's title, a general plea of no title to sue without specification being incompetent.[6]

*All Parties not called.*—The plea that all parties having interest in the suit have not been called, means either that some parties have not been called whose interests might be prejudiced by the decision in the action, or that some parties have not been called whose absence might prejudice the interests of the defender who is called, by increasing his liability or depriving him of his right of relief against them. For instance, the Court sustained a plea of "all parties not called," and dismissed an action at the instance of one township of crofters against another, in which questions were raised involving rights in which the landlord was interested and to which he was not made a party.[7] In actions upon joint and several obligations not constituted by writ or decree, all the joint-obligants must be called

[1] Waterston *v.* Murray, 1884, 11 R. 1036.

[2] *See supra*, Declinature of Judge.

[3] *See supra*, Jurisdiction.

[4] *See supra*, Execution of Citation.

[5] *See ante.*

[6] N. B. Rly. Co. *v.* Brown, Gordon, & Co., 1857, 19 D. 840.

[7] Mackinnon *v.* Mackinnon, 1905, 7 F. 589.

as defenders to the action.[1] But in a joint and several obligation constituted by writing or arising *ex delicto*, any one of the joint-obligants may be sued separately, and a plea of all parties not called will be repelled.[2] In all cases where a defender is liable *in solidum* in respect of a delict or *quasi* delict, the pursuer is entitled to proceed against him alone, even although there may be others who acted along with the defender and against whom he has a right of relief. The rule no doubt operates occasionally with some harshness, and the opinion has been expressed that in suitable cases where a defender is sued alone with the object of shielding others who are equally responsible, the decisions might with advantage be reconsidered.[3] This plea is of less importance now than formerly, since under the wide powers of amendment rendered competent by the Act of 1907, new defenders may be added on the motion of either party to the action, notwithstanding that the conclusions of the action may thereby be enlarged or altered.[4] Parties, however, who are not called, but who have an interest to defend the action, have a right to sist themselves as defenders, apart from statutory provision.

*Objections to competency and relevancy* run very much into each other.[5] The former apply to cases where the objection is to the crave of the initial writ, on the ground that the remedy by which the pursuer seeks to enforce his claim is wrong or improper, the latter to cases in which, even assuming that all the averments made by him are capable of substantiation, the pursuer is not entitled to decree. An action against a partner of a company or firm for a debt due by the company is an example of an action in which the plea of incompetency would be sustained; while an action for damages for personal injury in which no averment of negligence or fault is made against the defender, is an example of one which would fall to be dismissed on the ground of irrelevancy, since even if pursuer proved all his averments he would not in law be entitled to succeed. A plea that the action is irrelevant is, strictly speaking, not a dilatory or preliminary defence at all, since if it is sustained it is *res judicata*

[1] Neilson *v.* Wilson, 1890, 17 R. 608.

[2] Croskery *v.* Gilmour's Trs., 1890, 17 R. 697; Beatt *v.* Ogg & Others, 1897, 4 S.L.T. 374 (O.H.); Mackay *v.* Mackay, 1897, 4 S.L.T. 466 (O.H.); Sim *v.* Muir's Trs., 1906, 8 F. 1091.

[3] Sim *v.* Muir's Trs., 1906, 8 F. 1091, *per* Ld. Salvesen.

[4] Act, Rule 79.

[5] Coutts *v.* Coutts, 1866, 4 M. 802, *per* Ld. J.-C. Inglis.

between the parties, and the action can never therefore be raised again.[1] But the dismissal of an action in the Sheriff Court on the ground that it is irrelevant cannot be successfully pleaded as *res judicata* in a similar action subsequently brought in the Court of Session.[2] In discussing whether the plea of irrelevancy should be sustained, both the pursuer's statements and the defender's admissions may be taken into account.[3] Like the plea of "no title to sue," objections to the relevancy of the action are not now of the same importance as formerly, since under the powers of amending the record and the pleadings conferred by the Act of 1907, an action which is irrelevant as laid, may, subject to such conditions as to expenses, re-service, and the like as the Sheriff may see fit to impose, be amended at any time before judgment, so as to make it relevant.[4] A plea to the relevancy is commonly reserved till the conclusion of the proof, the tendency of the Court in recent cases being to treat an objection to the relevancy rather as an objection to the merits than as a purely preliminary plea, since the proof may disclose the fact that questions of law decided as preliminary pleas are really hypothetical and unnecessary for the actual decision of the cause. If, however, the pursuer's case makes it expedient to decide the question of relevancy before allowing a proof, as where it raises a pure and isolated question of law, such as the construction of a statute or of a rule of the common law, the relevancy of the action should be decided *primo loco*.[5]

*Lis alibi pendens*.—This plea means that another suit involving the decision of the same question as between the same parties is depending in another Court of competent jurisdiction. An action pending in the Sheriff Court may be removed to the Court of Session on the motion of either party *ob contingentiam*.[6] It may be waived by a prorogation of the jurisdiction.[7] The subject-matter of the two actions must be identical,[8] and the same parties, or

[1] *See* Hill *v.* Dymock, 1857, 19 D. 955.

[2] Govan Old Victualling Socy. Ld. *v.* Wagstaff, 1907, 44 S.L.R. 295, *following* Menzies *v.* Menzies, 1893, 20 R. (H.L.) 108.

[3] Pringle *v.* Bremner & Stirling, 1867, 5 M. (H.L.) 55.

[4] Act, Rules 49, 79; *see, however, infra* as to Employer's Liab. cases.

[5] Duncan *v.* Findlater, 1839, Macl. & Rob. Ap. (H.L.) 911; Bell *v.* Mylne, 16 S. 1136, *affd.* 2 Rob. Ap. (H.L.) 287.

[6] Wilson *v.* Junor, 1907, 15 S.L.T. 182 (O.H.); *see infra.*

[7] M'Kinlay *v.* Longmuir, 1850, 12 D. 926.

[8] Mags. of Arbroath *v.* Presby. of Arbroath, 1883, 10 R. 767.

parties representing the same interests, must be involved.[1] But where a wife has raised an action of divorce against her husband in the Court of Session, it would appear to be competent for her to raise an action of separation and aliment upon the same grounds in the Sheriff Court while the action of divorce is pending.[2]

*Preliminary Pleas disposed* of *ante omnia.*—Preliminary pleas must be disposed of by the Sheriff *ante omnia*, unless he thinks that from their being connected with the merits, or on any other ground, they should be reserved till a future stage of the cause.[3] In any event they should be disposed of before the merits are entered into.[4] But where a preliminary defence is such as to necessitate inquiry, a proof may be allowed of the facts involved therein before considering the merits of the cause.[5] Since, under the Act of 1907, actions under the Employers' Liability Act may now be disposed of in the Sheriff Court by jury trial, the disposal of preliminary pleas in such actions is now of considerable importance, and the preceding remarks as to the amendment of pleadings with reference to preliminary pleas must be construed as subject to the observation now made. It is the duty of the parties to see that the preliminary pleas are dealt with, since a party may by his conduct be held to have waived or departed from such a plea. Thus, where a defender consented to a warrant of sale being granted, his plea that the petition was incompetent was held to have been waived.[6]

**Pleas in Defence on the Merits** are too various to be classified, though little difficulty can in practice be experienced in deciding what constitutes such a plea.

[1] *See* Wishart *v.* Howatson, 1897, 5 S.L.T. 115 (O.H.).

[2] Stewart *v.* Stewart, 1906, 8 F. 769. This case was decided before actions of separation and aliment were competent in the Sheriff Court, but the *ratio* of the decision seems to warrant the statement in the text, though the result seems somewhat startling.

[3] Act, Rule 54 ; A. S. 1839, s. 38.

[4] Docherty *v.* M'Alpine, 1899, 2 F. 128.

[5] Hunter *v.* Darngavil Coal Co. Ltd., 1900, 3 F. 10 ; M'Lean *v.* Hassard, 1903, 10 S.L.T. 386 (O.H.) ; Duncan *v.* Fife Coal Co., 1905, 7 F. 958.

[6] N. B. Rly. Co. *v.* Carter, 1870, 8 M. 998.

# CHAPTER XII

## REVISAL AND ADJUSTMENT OF PLEADINGS AND CLOSING OF RECORD

### (*A*) Revisal and Adjustment of Pleadings


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### (*A*) Revisal and Adjustment of Pleadings

**Enrolment for Adjustment.**—Upon the defences being lodged, the Sheriff-Clerk enrols the cause for an ordinary Court day, occurring not less than four days thereafter, for adjustment.[1] Under the provisions of the Act of 1876, which were unnecessarily cumbrous and tedious, the Sheriff-Clerk transmitted the process to the Sheriff, who thereupon directed the action to be put to the roll of the first Court day occurring not less than four days thereafter, and required the parties then to adjust their pleadings.[2] The Act of 1907 greatly simplifies the procedure, and under its provisions it is not incumbent on the Sheriff to see the pleadings of parties at all until the case comes before him at adjustment.

**Adjustment of Pleadings.**—Upon the case coming before the Sheriff for adjustment, the parties finally adjust their pleadings preparatory to the closing of the record. If the pursuer have based his claims on averments which are inconsistent with each other, he

[1] Act, Rule 44.

[2] Act, 1876, s. 18.

must at this stage elect which set of averments he intends to abide by, and delete the other, or the action will fall to be dismissed.[1] The adjustment of the pleadings can only be adjourned once, except on special cause shown.[2] But either party may ask for an order for revisal of the pleadings, or the Sheriff may, *ex proprio motu*, order such a revisal or order the pursuer to answer the defender's statement of facts. In the event of a revisal or an answer to the defender's statement being ordered, the case will be continued on the adjustment roll till the revised papers are lodged. If no order for revisal have been made, each party "adjusts" his own pleadings, correcting inaccuracies and adding such explanations as may have become necessary, either owing to the averments of the opposite party or to expiscate a point not made previously sufficiently clear. All adjustments, other than mere verbal or grammatical alterations, are subject to the Sheriff's approval, and thus without such approval neither party is entitled to add any new statement to the record.[3] But the pursuer may be allowed to add to the condescendence his answers to the defender's statement of facts, and although formerly it was not competent to delay the adjustment by making a separate order for an answer to such statement,[4] it is, as will be seen, now competent to do so. The adjustments must not be such as could only properly be made under an order for revisal, just as statements made on revisal should not be such as could properly be made only by amendment, subject to conditions as to expenses, re-service, or otherwise. Alterations once made, and permitted at adjustment, cannot, without the leave of the Sheriff, be subsequently altered or deleted.[3] Under the Act of 1853, section 4, the Sheriff was required to strike out at adjustment any matter in the pleadings which he might deem either irrelevant or unnecessary. Under the provisions of the Act of 1907, the Sheriff is relieved from the necessity of executing a duty so arbitrary and so delicate as dictating to a party the manner in which he is to frame his pleadings, or restricting him from stating averments which in such party's opinion are relevant; but it cannot be doubted that the Sheriff has not only the power but a duty to see that not only is the record in such order as to ensure that the question in controversy is properly placed before

[1] M'Sourley *v.* Paisley Mags., 1902, 10 S.L.T. 46 (O.H.).

[2] Act, Rule 44.

[3] Reid *v.* Meux, 1861, 24 D. 221; Taylor *v.* M'Dougall, 1885, 12 R. 1304.

[4] Kessack *v.* Garden, 1869, 7 M. 588.

the Court, but that averments which are not merely irrelevant but grossly improper and offensive are excluded from the pleadings.[1] Section 4 of the Act of 1853, which expressly placed upon the Sheriff the duty of striking out matter from the pleadings which he deemed to be either irrelevant or unnecessary, is of course repealed, in common with the rest of the Act, by the Act of 1907. But as section 5 of the Act of 1907 expressly provides that nothing contained in the Act shall derogate from any jurisdiction, power, or authority presently possessed or in use to be exercised by the Sheriffs in Scotland, the power which the Sheriff possessed under the Act of 1853 is still preserved. All alterations or additions made on the record must be authenticated by the Sheriff's initials,[2] and it is the duty of the agents of the respective parties to see that the pleadings are so authenticated.[3] The Act makes no provision for a continuation of the existing practice of having the adjustments initialed by the agents of the respective parties, though the advantages of a continuance of such a useful and even necessary practice are sufficiently obvious.[4]

**Revisal of Pleadings.**—The Sheriff may, upon cause shown or *ex proprio motu*, order a revisal of the pleadings, or may order pursuer to answer the defender's statement of facts.[5] The time at which the order of a revisal of the pleadings may be made is not specifically laid down by the Act, but the inference from its terms is unmistakeable. The Act of 1876 provided that neither party was, as a matter of right, entitled to ask for a revisal of his pleadings, but that it was competent for the Sheriff to allow or order a revisal upon just cause shown,[6] the time at which such a motion was competent being left to inference. But under that Act the Sheriff had no power *ex proprio motu* to order a revisal, nor had he the power of compelling a pursuer to answer the defender's statement of facts. Under the Act of 1907, as under that of 1876, the parties are not entitled as a matter of right to revise their pleadings, and it is

[1] *See* Kessack *v.* Garden, *sup.*; Hamilton *v.* Anderson, 1858, 20 D. (H.L.) 16; Harper *v.* Stewart, 1869, 8 M. 24; Wardrope *v.* D. of Hamilton, 1876, 3 R. 876; Thomson *v.* Landale, 1897, 5 S.L.T. 269 (O.H.); Heriot Hill *v.* Heriot Hill, 1906, 14 S.L.T. 182 (O.H.).

[2] Act, Rule 53; *see* Kilcoyne *v.* Wilson, 1907, S.C. 86.

[3] *See* Egleton *v.* Flowerdew, 1849, 11 D. 1486.

[4] *See* Kilcoyne *v.* Wilson, *sup.*

[5] Act, Rule 49.

[6] Act, 1876, s. 17.

within the discretion of the Sheriff to order such a revisal or not as he sees fit. It cannot, however, be doubted that where a revisal of the pleadings would have the effect of enabling the Sheriff more effectually to determine the real question in controversy, the refusal of a motion by either of the parties to revise his pleadings will be a matter of great rarity.

*Time for.*—If a revisal is allowed or ordered, the interlocutor will specify the time within which the revisal is to be made. The Sheriff has power on cause shown to prorogate the time for lodging any production or pleading,[1] apparently as often as the justice of the case may require. But if the revised pleading is not lodged within the time ordered by the Sheriff, decree may be given against the party in default, or the action may be dismissed with expenses.[1]

*How made.*—The statute apparently contemplates that additions or alterations shall be made upon the original condescendence and answers, not that separate papers containing such alterations and amendments should be lodged in addition; and it provides that all alterations and additions made on the record must be authenticated by the Sheriff's initials. Under the old forms of process the condescendence formed part of the initial writ. The care with which the Act of 1876 provided[2] that the principal petition should not be borrowed without express permission, was thought to indicate that it was not intended that it should be meddled with more than was actually necessary, and that therefore a revision of the condescendence could properly be made only by lodging a separate paper giving effect to the alterations and amendments desired. As the revised condescendence thus required to be contained in a separate paper, it was thought most conducive to convenience to have the revised defences in the same form.[3] But even although it may involve some slight multiplication of papers, with the consequent necessary reference from one set to another, it would still appear to conduce to convenience to have the record closed upon the clean revised papers as lodged.

Where an order for revisal is made and no separate statement of facts is made by defender, the pursuer properly revises and amplifies his condescendence on those points rendered necessary by the statements in the defences. Where the defender makes a statement

[1] Act, Rule 56.
[2] S. 10.
[3] *See* Dove Wilson, 4th ed. p. 146–7.

of facts, and the pursuer either deems it expedient, or is expressly ordered by the Sheriff, to answer the statement, the original condescendence is best allowed to remain unaltered, the necessary new averments being incorporated in the pursuer's answers, since if the defender in revising his pleading alters it the pursuer must meet or answer the revised statement.[1] The defender in turn correspondingly deals in his revised statement of facts with the pursuer's answer to it. Each party, in addition, appends such further or amended pleas in law as the revised pleadings suggest. Where, as not infrequently is the case, an answer by pursuer to defender's statement of facts is all that is necessary to enable the parties to meet each other's averments, the Sheriff has now power to order such answer.

*What included under "revisal."*—As will be seen later, the Sheriff may, on the motion of either party, and upon such conditions as to expenses, re-service, or otherwise as he may deem proper, allow the record (including the pleadings) to be altered or amended to the effect of determining the real question in controversy (including amendment of the instance and the initial writ and the adding of parties), notwithstanding that the conclusions of the action may thereby be enlarged or altered. But under an order for revisal the alterations and amendments in the pleadings are not subject to the approbation of the Sheriff, and are made subject to no conditions as to expense or otherwise. Probably, therefore, the revisal should not be such as to amount to an alteration or amendment which could properly be made subject only to the permission or approval of the Court, and to conditions as to expenses, etc. The amendments which may competently be allowed will be considered later, but meantime it may be said that, generally speaking, alterations which have the effect of strengthening or amplifying the pursuer's case, but which do not raise a new ground of claim or allege any fact inconsistent with the previous pleading, may competently be made on an order for revisal.[2] In other words, it may perhaps be deduced from the terms of the section of the Act just quoted, regarding amendments which may competently be made by permission of the Sheriff, that under an order for revisal all such alterations and amendments of the pleadings may be made as will have the effect of enabling the

[1] Reid *v.* Reid's Trs., 1887, 14 R. 770.

[2] *See* Eng. Sup. Court Rules, 1883, Order 19, Rule 16.

Sheriff to determine the real question in controversy, provided they do not include an amendment of the instance or of the initial writ, or the addition of parties, or do not have the effect of enlarging or altering in character the conclusions of the action.

*Failure to revise.*—According to the rule of pleading already referred to, a party who is accorded an opportunity of admitting or denying a statement, is held to have admitted it if he does not take advantage of the opportunity afforded him to deny it. Thus, if a defender fail to revise his defences after being ordered to do so, he will be held as admitting such parts of the pursuer's revised condescendence as he does not expressly deny. And conversely, if a pursuer fail to revise his condescendence, with the result that the record is closed on the original condescendence and defences, he will be held as admitting the statements made in the defences. Thus, where a pursuer failed to revise his condescendence after an order to do so had been pronounced, the record was closed on the original condescendence and the defences. The defence was an admission of the debt sued for and a plea of compensation, and the pursuer being held to have impliedly admitted the debt with respect to which compensation was pleaded, decree was pronounced accordingly.[1] Under the provisions of the Act of 1907, if either party fail to lodge a production or pleading, or to implement an order of the Sheriff within the time required by the Statute or ordered by the Sheriff, the Sheriff may punish the delinquent party by granting decree against him or by dismissing the action.[2] The Sheriff may, however, on cause shown, prorogate the time for lodging the revised papers.[2]

**Lodging Productions.**—Along with his pleadings, or at latest before the closing of the record, each party must, if required by any other party to the cause or by the Sheriff, lodge any productions founded on in the pleadings, so far as they may be within his custody or power.[3] Where such documents are not produced by either party, or where they are in hands of third parties, the Sheriff may, on the motion of *either* party, grant commission and diligence for their recovery, and he may on that account delay closing the record.[4] A party who does not produce documents within his control or

[1] Logan *v.* Henderson & Co., 1877, Guthrie's Sel. Ca. i. 416.

[2] Act, Rule 56.

[3] Act, Rule 47.

[4] Act, Rule 48; Act, 1876, s. 22; A. S. 1839, s. 33.

custody within the time in which he is ordered to do so by the Sheriff, may be penalised by having decree granted against him, or the action may be dismissed.[1] But it is within the discretion of the Sheriff, at any time before judgment, to allow a party to produce any document which he has failed to produce timeously, upon such conditions as to payment of expenses and allowing further proof as to him may seem just.[2] The documents which must be so lodged before the closing of the record, are only those on which either party *founds* in his pleadings; other documents may be timeously lodged at the proof. Under previous practice it was imperative that documents founded on in the pleadings and in the party's custody should be lodged before the closing of the record. If the documents were in the hands of a third party, the party desiring their production was directed to move for a diligence to recover them; and accordingly, if the party who desired their production at this stage failed to recover them, his opponent had the right to object to his doing so afterwards except upon such conditions as the Sheriff might think just. Under the Act of 1907, however, the documents need only be lodged at this stage if the party requiring them moves, or the Sheriff *ex proprio muto* orders, that they be lodged, whether they be in the hands of the parties to the cause or in those of third parties. Again, under the Act of 1876, the right of a party to ask for diligence before the closing of the record was limited to one for the recovery of documents on which he himself founded in his pleadings, but he had no authority, as is conferred upon him by terms of the Act of 1907, to crave a diligence to enable him to recover documents on which his opponent alone founded. While no doubt under the former rule such a diligence was unnecessary, since if the party founding on the documents did not produce or recover them he lost their benefit, yet it seems only consistent with equity that where a party founds on a document of which, though not in his possession, he knows the contents, his adversary should be entitled to be placed in a position of similar advantage at the earliest practicable moment in the conduct of the cause. This advantage the rule of the Act of 1907 confers on him. The Sheriff has power under the Act of 1907 at any stage in the cause to order the production of documents.[2] The Court of Session, in the exercise of its common law power, in certain circumstances grants diligence

[1] Act, Rule 56. [2] Act, Rule 68.

for the recovery of documents before the pleadings require to be lodged, and in certain exceptional circumstances the power vested in the Sheriff will enable him to grant a diligence for the recovery of a document before the diet for the closing of the record. In any event a party would not be entitled to ask a diligence for the purpose of "fishing" for documents to enable him to ascertain whether they might avail him for the purposes of his action or defence.[1] But he might, for instance, if pursuer, obtain a diligence to recover from the defender before the tabling of the initial writ, a written agreement on which the action is founded, in order to enable him to have it stamped;[2] and, if defender, he might be enabled to recover documents which are absolutely essential to him in the preparation of his defence.[3]

*Diligences to recover Documents* are carried out under the rules applicable to commissions to take other evidence, with the exception that the party craving the diligence first lodges a specification of the documents he calls for, and that, if they appear to be relevant to the issue of the cause and that he is entitled to have them made forthcoming, the commission to recover them, or such part of them as the Sheriff thinks right, is granted to him. A haver is cited in the same way as a witness, a copy of such part of the specification as may be applicable being served upon him at citation. The examination of a haver is conducted in the same way as that of a witness, except that he is questioned only with reference to the documents called for, whether they are in his custody, and if not whether he knows where they are.[4] A haver refusing to answer a question is dealt with in the same way as a recalcitrant witness. There is no rule that documents called for in a specification must be clearly admissible in evidence; the rule is that the diligence will be refused if it is shown that they cannot be evidence.[5] This diligence may be granted on joint motion of parties. The subject is more fully dealt with later.

[1] Craig *v.* N. B. Rly. Co. 1888, 15 R. 808; Dickson on Evidence, ii. 769.

[2] Brady & Co. *v.* Story, 1896, 3 S.L.T. 509 (O.H.).

[3] Dalgleish's Trs. *v.* Mathieson's Trs., 1902, 10 S.L.T. 29 (O.H.); Cal. Rly. Co. *v.* Crockett & Co., 1902, 10 S.L.T. 49 (O.H.); Hope *v.* Hope's Trs., 1895, 3 S.L.T. 45 (O.H.); Matheson *v.* Scot. Trade Protect. Socy., 1897, 5 S.L.T. 213.

[4] *See* Sommervell *v.* Sommervell, 1900, 8 S.L.T. 76 (O.H.).

[5] Sleigh *v.* Glasgow & Transvaal Options Ltd., 1903, 5 F. 332, *per* Ld. Kinnear; Murphy *v.* Clyde Navigation Trs., 1902, 4 F. 653.

### (*B*) Closing the Record

When the pleadings have been finally adjusted, the Sheriff, by formal interlocutor, closes the record,[1] all alterations and additions made on it being authenticated by the Sheriff's initials.[2]

**Disposal of Preliminary Pleas.**—If preliminary pleas have been stated, the Sheriff must first dispose of them, unless he thinks that, from their being connected with the merits or on any other ground, they should be reserved till a future stage of the cause.[3] These provisions would appear to effect a considerable alteration on previous practice. Under the provisions of the Act of Sederunt of 1839, and the Sheriff Courts Act of 1853, the Sheriff was required to dispose of the preliminary pleas (or to reserve them till a future stage) *before* the record was closed. The Act of 1876 is silent on the subject of the disposal of the preliminary defences, though it provided that at the closing of the record parties should be required to state whether they renounced further probation, and that if they did the Sheriff should appoint the action to be debated. The Act of Sederunt of 1839 provided that at the meeting for the adjustment of the pleadings any dilatory defences proponed by the defender were to be disposed of "immediately" by the Sheriff, and that if he sustained them he was at the same time to determine the matter of expenses; while, if they were repelled, the cause was to "proceed in its due course of preparation." Thereafter, the preliminary defences having been disposed of, the record was closed on the summons and defences, or, if parties so desired, a revisal was allowed, and the record was closed on the revised pleadings. Under the provisions of the Act of 1853, the process was transmitted to the Sheriff so soon as the defences were lodged, and he thereafter appointed parties to meet him within six days. At that meeting the dilatory defences, if any, were either forthwith disposed of or their consideration was reserved for a future stage of the cause. Thereafter, unless parties were willing to close on the summons and defences, a revisal was ordered, and subsequently the record was closed on the revised pleadings. The meaning of the provisions of the Act of 1907 seems to be that after parties have finally adjusted their pleadings the record is closed, and that so soon as that has

[1] Act, Rule 52; A. S. 1839, s. 54; Act, 1853, s. 4.

[2] Act, Rule 53; A. S. 1839, s. 45.

[3] Act, Rule 54; A. S. 1839, s. 38.

been done, any preliminary pleas which may have been stated are disposed of there and then, where such a course is possible. But where the Sheriff is of opinion that, because they are connected with the merits of the cause or on any other ground, they should be reserved till a future stage of the cause, he may reserve them for disposal in the final interlocutor disposing of the merits. If, however, the pleas are such that they ought to be disposed of before the merits of the cause are entered into, but from any reason they cannot be disposed of at the actual closing of the record, the Sheriff may appoint a diet at which such pleas shall be subsequently debated. In any event, the preliminary pleas must either be reserved or they must be disposed of before any other step in the process is taken.[1]

**Further Procedure determined.**—At the closing of the record the future procedure in the action is determined. If the parties renounce probation they sign a minute to that effect on the interlocutor sheet, and the Sheriff either hears parties on their respective pleas there and then, where such a course is feasible, or he appoints them to debate the cause at a subsequent diet.[2] Under the provisions of the Act of 1876, the Sheriff was bound at the closing of the record to require the parties to state whether or not they renounced probation, and if they did he pronounced an interlocutor accordingly.[3] It was apparently necessary that, before parties could be heard on the debate roll, they should have first renounced probation, with the result that where parties differed as to whether there should be a proof, or what proof ought to be allowed, or maintained that one or more pleas should be disposed of before determining the matter of proof, there was no alternative between allowing a case to go to proof or perilling the whole cause on the result of the discussion of the case after proof had been formally renounced. The Act of 1907 does not, however, require parties to formally renounce probation, and there seems to be under its provisions nothing incompetent in the Sheriff permitting or ordering the parties to debate the case, either on preliminary or other pleas, before parties actually decide

[1] *See* Docherty *v.* M'Alpine, 1899, 2 F. 128 ; Hunter *v.* Darngavel Coal Co., 1900, 3 F. 10 ; Maclean *v.* Hassard, 1903, 10 S.L.T. 386 (O.H.).

[2] Act, Rule 58.

[3] S. 23.

whether probation should or should not be ultimately renounced. If that be a correct reading of the provisions of the Statute, it would lead to an assimilation of the practice of the Sheriff Court to that of the Court of Session, by the introduction in the Sheriff Court of a procedure roll, the ordinary purpose of which is to dispose of the preliminary pleas, and to determine the mode of proof and of any restrictions on it which may be necessary. If parties are agreed that a proof is necessary, the Sheriff must, with the least possible delay, fix a date for taking the proof, and he may at the same time limit the mode of proof.[1] The section of the Act does not specify that "if at the time of closing the record" a proof appears to be necessary its date shall be fixed, from which circumstance it appears to be a fair inference that a proof may appear necessary at some other diet in the cause than that at which the record is closed, an inference which, if justified, would appear to still further strengthen the view indicated as to the construction of the terms of the Act.

**Allowance of Proof.**—If the preliminary pleas are of such a nature that they may properly be reserved till a future stage in the cause, and parties are agreed that a proof is necessary, the proof allowed will be a "proof before answer"; that is, under entire reservation of all pleas (including relevancy) raised in the record.[2] A plea of no jurisdiction should be disposed of *ante omnia*, and an allowance of proof reserving such a plea is, except in very exceptional circumstances, improper.[3] The consequence of allowing a proof before answer as to the relevancy is that, although the facts as averred are proved, they may be held insufficient in law to support the conclusions of the summons or averments in defence, and the final decision may be against the party proving them.[4] Without the reservation or qualification contained in the words "before answer," the question of relevancy is foreclosed, with the result that, though questions of law may be argued after the proof, the party against whom the facts are proved can no longer maintain that proof of them should not have been allowed or, that it should be disregarded. A proof before answer

[1] Act, Rule 59.

[2] *See* Moncrieff *v.* Sievwright, 1895, 33 S.L.R. 456.

[3] M'Leod *v.* Tancred, Arrol, & Co., 1890, 17 R. 514.

[4] M'Rostie *v.* Halley, 1850, 12 D. at p. 818, *per* Ld. Mackenzie.

is also sometimes allowed in cases where the question is raised as to the competency of parole proof, and in such cases the proof is before answer as to the competency of such proof. But except where such a course is sanctioned by custom, it is improper to allow a proof before answer when a plea is stated that the only proof competent is by writ or oath.[1] Where the averments on record are such that as to some parole proof is competent, while as to others only proof by writ or oath is competent, a proof before answer may be allowed, in which case proof by parole may may be taken on both kinds of averments, however competently proveable, it being for the Court to determine subsequently whether any or the whole of the parole evidence may be looked at.[2] If, however, the respective averments are clearly separable, a proof by writ or oath should be allowed with reference to those averments to which such a proof is applicable, while a proof *prout de jure* should be allowed with reference to those capable of being proved by parole.[3] A proof before answer does not, however, authorise incompetent evidence, the competency of each question asked at the proof being left to the determination of the judge who presides.[4]

A proof *prout de jure* means a parole proof, in which every kind of evidence that might be laid before a jury is permissible. Where parole evidence is admitted to prove an agreement, informal writings, including letters and receipts (though neither holograph nor tested) may be spoken to by the witnesses, and so made part of the evidence in the case.[5] A proof *habili modo* is one in which the proof of the averments made, or of such of them as the restriction may apply to, is by the writ or oath of the party's opponent.[6] The phrase *habili modo* has a recognised meaning in practice, and is a servicable way of pointing out that an allowance of proof does not imply that all the facts disclosed on record may competently be proved by parole.[7] When a proof is allowed without

[1] Thomson *v.* Fraser, 1868, 7 M. 39, *per* Ld. Cowan; Turnbull *v.* Oliver, 1891, 19 R. 154.

[2] Robertson *v.* Murphy, 1867, 6 M. 114; Thomson *v.* Fraser, 1868, 7 M. 39; M'Vean *v.* M'Lean, 1873, 11 M. 506; Moncrieff *v.* Sievwright, 1895, 33 S.L.R. 456.

[3] Stuart *v.* Stuart, 1869, 7 M. 366; Davie *v.* Stark, 1876, 3 R. 1114.

[4] Robertson *v.* Murphy, *sup.*

[5] Grant *v.* Mackenzie, 1899, 1 F. 889, *per* Ld. M'Laren.

[6] Gray *v.* Scott, 1868, 6 M. 197.

[7] Paterson *v.* Paterson, 1897, 25 R. 144, *per* Ld. Pres. Robertson; Watt v. Bridgeton Working-Men's Club, 1901, 9 S.L T. 5 (O.H.).

any special words of limitation, a proof *prout de jure* is understood. Under the rule which formerly governed practice, when a proof was allowed in cases in which no averments were made by the defender, the interlocutor "allowed the pursuer a proof of his averments, and to the defender a conjunct probation." Where, however, the defender made averments and both parties were allowed a proof, an allowance of proof to both parties and to either party a conjunct probation, was a form of interlocutor at once erroneous and misleading. In such cases the proper form of interlocutor was to "allow both parties a proof of their respective averments, and to the pursuer a conjunct probation," because the defender was bound to lead his conjunct probation when he led his proof in chief. After the pursuer had led his proof in chief and the defender his conjunct probation and proof in chief, the pursuer was entitled to a probation conjunct to the defender's proof in chief; but after that the defender was entitled to no further proof, unless he could show that proof had been led in the pursuer's conjunct proof of such a nature as entitled him to a proof in replication, in which case he required to apply to the Court for leave to lead such proof in replication, and had to show cause why it should be allowed.[1] That rule has, however, since been modified, and in accordance with present practice the pursuer in the issue leads all his evidence in chief, and that in anticipation of any ordinary defence at the same time. Any subsequent probation which he may be allowed will be confined strictly to that in replication of defender's proof, and will be be confined to matters with reference to which a proof in anticipation could not fairly have been expected.[2] The interlocutor allowing proof should therefore now either allow one party a proof and the other a conjunct probation, or simply allow both parties a proof of their respective averments, in which case each party will have a proof in chief and a proof conjunct to that of his opponent, both kinds of proof being led together. An interlocutor "allowing the pursuer a proof of his averments and to the defender a conjunct probation," was held to so limit the scope of the inquiry as to disentitle the defender to recover under a diligence documents

[1] Mags. of Edinr. *v.* Warrender, 1862, 1 M. 13, *per* Ld. J.-C. Inglis.

[2] Dick & Stevenson *v.* Mackay, 1880, 7 R. 778; Gairdner *v.* Young, 1874, 2 R. 173; Richardson *v.* Fleming, 1867, 5 M. 586.

which would be evidence only of his averments in defence.[1] Where an interlocutor allows a proof, the party so allowed is entitled to prove all the averments he makes on record, and he is accordingly entitled to a diligence for the recovery of evidence on the assumption that all the averments so remitted to probation are relevant.[2] Ordinarily the pursuer, as the pursuer in the issue, leads in the proof, and when the interlocutor is silent on the point it is understood that the pursuer shall lead. Where, on the other hand, the *onus* of proof is on the defender, it is generally in accordance with convenience that the defender shall lead in the proof, in which case the interlocutor fixing the proof will enjoin that he should do so. But the *onus* and the lead in the proof are not necessarily the same, and, generally speaking, that party will be ordered to lead whose leading will most conduce to the balance of convenience, either from the fact that the bulk of the proof falls on his shoulders or that the case of his opponent consists in proving a negative.[3]

[1] Scott & Co. *v.* Forrest & Turnbull, 1897, 24 R. 877.

[2] D. of Hamilton's Trs. *v.* Woodside Coal Co., 1897, 24 R. 294; Barr *v.* Bain, 1896, 23 R. 1090.

[3] *See* Gibson *v.* Adams, 1875, 3 R. 144.

# PROCEDURE SUBSEQUENT TO CLOSING THE RECORD

## CHAPTER XIII

## THE PROOF

### (*A*) Matters Preliminary to Diet of Proof


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### (*B*) Procedure at Proof


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### (*A*) Matters Preliminary to Proof

**Precognition of Witnesses.**—The expenses attendant on the precognition of witnesses are not allowed, as between party and party, unless an order for proof has been allowed. Witnesses are not therefore usually precognosced before an interlocutor allowing proof has been issued.[1] But as the expenses of precognitions, so far as relevant and necessary for proof of the matters in the record between the parties, although taken before the raising of the action or the preparation of the defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor allowing proof is pronounced,[2] it will generally be found in accordance with the dictates both of prudence and con-

[1] Church *v.* Cal. Rly. Co., 1883, 11 R. 398.

[2] A. S. 1878, s. 7.

venience to ascertain at the earliest possible moment by precognition how far the averments on record can be substantiated by the witnesses by whose evidence such averments are expected to be proved. Witnesses are bound to submit themselves to precognition, provided the ordinary courtesies of life are observed and their convenience is reasonably studied.[1] The fact that a witness has refused to submit himself to precognition may be adduced in evidence, and a recalcitrant witness who is unable to afford any satisfactory explanation of his refusal to be precognosced may be refused his expenses. Witnesses ought never to be precognosced in presence of each other, and though an objection to a witness that he has been procognosced in presence of another is not now, as it once was, a fatal objection to the admissibility of such witness's evidence,[2] yet if the fact can be shown to have tended to imperil the case of the opposing party, it may lead to the witness's evidence being discredited or even totally disregarded.[3] The agent in precognoscing a witness should confine himself strictly to asking questions, and he should not read to the witness the pleadings or any part of the process, and still less communicate to him any version of the facts favourable to the party on whose behalf he is expected to appear. He must not be put on oath,[4] and he ought not to be asked even to read or sign his statement. A witness cannot be contradicted by what he said on precognition, and it is therefore incompetent to ask him when in the witness-box whether his statements differ from those made in precognition.[5] The notes of the precognition of a person since deceased are not receivable as evidence.[6]

**Citation of Witnesses and Havers.**—A copy of an interlocutor, certified by the Sheriff-Clerk, allowing a proof or fixing a diet for the trial of any action, or for the examination of witnesses or havers, or fixing a date for a jury trial, is a sufficient warrant for citation of witnesses and havers,[7] at the instance of either party, to attend the proof or jury trial. Such warrant may be lawfully

[1] *See* Junner *v.* N. B. Rly. Co., 1877, 4 R. 686.

[2] Kerrs & Co. *v.* Penman, 1830, 5 Mur. 145.

[3] Reid *v.* Duff, 1843, 5 D. 656; Dickson on Evidence, ss. 1751–2.

[4] 5 & 6 Will. IV. c. 62, s. 13.

[5] Emslie *v.* Alexander, 1862, 1 M. 209; Cook *v.* M'Neill, 1906, 8 F. (J.) 57; *see infra*, Questions Competent.

[6] Graham *v.* Western Bank, 1865, 3 M. 617; Stevenson *v.* Stevenson, 1893, 31 S.L.R. 129.

[7] Act, Rule 71.

executed within the jurisdiction of any Sheriff, without indorsation by the Sheriff-Clerk of that jurisdiction, either by an officer of the Court granting the warrant or of that within which it is to be executed.[1] The warrant may be served either by Sheriff officer or by postal registered letter in the same manner and subject to the same rules as apply to other citations.[2] The warrant is in the form prescribed by the Act,[3] and requires the witness to attend at the Sheriff Court-House, specifying, where necessary, the particular room or chambers, on a specified day and hour, and requires him, if necessary, to bring with him such documents as may be specified. There is no specified time within which a witness may claim to be cited, but he cannot be cited on a less induciæ than forty-eight hours where the citation is effected by an officer of Court, or if by registered letter not less than twenty-four hours in addition to the forty-eight, or seventy-two hours in all from the date of posting. If he be duly cited on such an induciæ, and have been tendered his travelling expenses if they be demanded, he may be ordained to forfeit a penalty of £2 if he fail to attend a diet either before the Sheriff or a Commissioner, unless a reasonable excuse for his failure be offered and sustained by the Sheriff.[4] Besides, the Sheriff may grant decree for the penalty in favour of the party on whose behalf the witness or haver was cited,[5] and he may allow an extract of such decree to be issued forthwith.[6] But as failure to attend a diet of Court after due citation is in itself a contempt of Court, it is further competent to the Sheriff to grant second diligence (which is effectual in any Sheriffdom in Scotland without indorsation) for compelling the attendance of the witness or haver under pain of arrest and imprisonment, until such caution as the Sheriff may require is found for his due attendance, the expense of which may in like manner be decerned against him.[7] Apart altogether from the fact that witnesses and havers are equitably entitled to such reasonable and timely notice as may enable them to make arrangements to attend the diet of proof, and that therefore a witness who is cited on such short notice as to preclude the possibility of making adequate arrangements, would experience little difficulty in providing a

[1] Act, Rule 10.
[2] *See ante*, Citation.
[3] Form F.
[4] Act, Rule 71.
[5] Act, Rule 71.
[6] Act, Rule 85.
[7] Act, Rule 73.

"reasonable" excuse for his absence, it would appear to be incumbent on the agents of the parties to cite both witnesses and havers as soon after the diet of proof has been fixed as is convenient. Similar considerations will probably suggest the expediency, in the case of busy professional men and others whose time is valuable, of naming in the warrant of citation a particular hour at which their attendance is desirable. Where, for instance, the evidence of a medical man is required, it would be oppressive to cite him for attendance at, say, ten o'clock, if there were a reasonable prospect that his evidence would not be taken till two or three in the afternoon. And although usually it will be found expedient to take the witnesses in their natural order, no appreciable disadvantage, except possibly in jury trials, is likely to result from consulting the convenience of one or more of such witnesses by taking them out of the order in which it was originally intended they should be taken. In certain cases, where professional men are engaged as witnesses on each side, it is not unusual in practice to take their evidence as they respectively arrive in Court. Though ordinarily the interposition of a witness can only take place by the sanction of the agents of the parties, consent is seldom withheld. As the object of the citation is merely to ensure the attendance of the witness at the diet for which he is cited, it is not incompetent to examine a witness who is present in Court without having been cited.[1] Such witness's expenses must, however, be paid in the usual way. On similar grounds, a witness who is present in Court in answer to what he conceives to be a bad citation, cannot decline to give evidence.[2]

Where the witness or haver is cited by registered letter which is returned to the Sheriff-Clerk, the Sheriff may order a new citation either in the same method or by an officer of Court; or, if he is satisfied that the letter was tendered at the proper address and refused by the witness, he may, without waiting for the diet of proof, issue second diligence to compel his attendance.[3] Whether witnesses are cited under the old form by Sheriff officer personally or under the form sanctioned by the Citation Amendment Act of 1882, no higher fees than those sanctioned for citation by registered letter

[1] 15 Vict. c. 27, s. 1

[2] Watson *v.* Livingstone, 1902, 5 F. 171.

[3] Steedman *v.* Steedman, 1886, 23 S.L.R. 856.

are allowed on taxation, unless the Sheriff is of opinion that citation in that form was not expedient in the interests of justice.[1] An agent who cites a witness is personally responsible for such witness's fees.[2]

### (*B*) Procedure at Proof

**The Diet.**—The proof proceeds upon the day appointed, and it is taken thereafter so far as possible continuously, but the Sheriff has power to adjourn the diet from time to time.[3] Under the Act of 1876, the diet could not be prorogated by consent of parties, though under the Act of 1853 it might be upon cause shown.[4] Where a proof was *per incuriam* taken on a day prior to that appointed, the presence of the parties was held to imply their consent, and neither was held entitled afterwards to object.[5] If both parties fail to appear, the Sheriff-Substitute must dismiss the action, unless sufficient reason to the contrary appear,[6] but the parties may be reponed on appeal to the Sheriff. If the party appointed to lead in the proof fails to appear by himself or his agent, the Sheriff may, if he see fit, adjourn the diet to another day. finding the absent party liable in expenses; or he may grant decree as craved, or of absolvitor, according as the pursuer or defender is the offending party, such decree being a decree by default; or he may allow the party appearing to lead his evidence, and thereafter treat the case upon the evidence adduced, on the assumption that the absent party either could or would not lead any evidence to rebut the evidence adduced. A party who leads evidence in the absence of his opponent is entitled to ask for decree only on the merits, and not merely by default. If the party to whom a conjunct probation is allowed fails to appear, he may either be decerned against by default or the party appearing may lead his proof, declare it closed, and ask judgment on the merits. It is seldom, however, that a proof is led by one party in the absence of the other, and such a procedure is resorted to only when cogent reasons for preserving the evidence exist. In any event, however, a decree which is pronounced against a party by reason of his absence is a decree by default.

[1] Cit. Amend. Act, 1882, s. 6.
[2] Act, Rule 72; Fraser *v.* Stronach, 1885, 23 S.L.R. 76.
[3] Act, Rule 69.
[4] Act, 1876, s. 19; Act, 1853, s. 10.
[5] M'Kay *v.* Ross, 1853, 1 Irv. 288.
[6] Act, Rule 56; Act, 1876, s. 20.

**Examination of the Witnesses.**—The witnesses are examined separately in such order as may best conduce to establish the averments made on record. As a general rule, it may be said that to take the witnesses in their chronological order will probably be found most expedient. There are, however, occasions when a departure from this rule is not only justified but necessary. Thus, while the pursuer is ordinarily the first witness, where it is desirable that his evidence should be reserved for the purpose of explaining or contradicting in detail the evidence of hostile witnesses who must be called, his evidence may properly be taken last. And again, in certain cases, such as those of affiliation, where there is a *penuria testium*, it is (or rather was) an almost invariable rule that the first witness adduced for the pursuer is the defender himself. Unless his is the only available evidence on a plain matter of fact, it is in general improper to put the defender in the witness-box and treat him as a hostile witness.[1] But this rule is relaxed in filiation cases, and in such cases the Court recognises the right, if not the propriety, of putting the defender in the witness-box with the express purpose of afterwards introducing testimony to contradict him.[2] It must, however, be clearly understood that the practice of calling the defender as the first witness, though it may be defensible in certain circumstances, is one which does not meet with the approval of the Court: in any event, if such a course is taken the position will be carefully scrutinised, so that the defender by being made a witness for the pursuer is put to no disadvantage.[3] It is not now a fatal objection to a witness that he has been in Court during the examination of another witness, and in such cases it is competent for the Sheriff in his discretion to admit the witness, where it appears that his presence was not the consequence of culpable negligence or criminal intent, and that he has not been unduly instructed or influenced by what has taken place, or that injustice will not be done by his examination.[4] After his examination a witness is entitled to remain in Court, unless there appears a probability that he will be recalled. But he should not in any event be allowed to hold communings with witnesses whose evidence remains to be given.

[1] M'Arthur *v.* M'Queen, 1901, 38 S.L.R. 732.

[2] Kerr *v.* Darroch, 1901, 4 F. 396.

[3] M'Whirter *v.* Lynch, 1908, S.C., *per* Ld. Pres. Dunedin; *approving* M'Arthur *v.* M'Queen, *sup.*, and *explaining* Kerr *v.* Darroch, *sup.*

[4] 3 & 4 Vict. c. 59, s. 3.

*Witness must be sworn.*—Before a witness can competently give evidence, he must either take an oath or make an affirmation that he will tell the truth. An oath or affirmation by a witness that he will tell the truth, implies an obligation on his part to tell not only nothing but the truth but the whole truth, so far as he is bound by law to disclose it, though not with reference to matters the knowledge of which he is legally entitled to withhold.[1] Children over fourteen years of age are sworn in the same way as adults, but below that age it is in the discretion of the Sheriff whether he should administer the oath or merely admonish the witness to tell the truth.[2]

*Examination* in initialibus.—Should a party against whom a witness is adduced so desire, the witness may be examined *in initialibus* as to his relationship to the party adducing him, his interest in the cause, or the fact of his having acted as agent in it. He may also be interrogated as to whether he has been instructed what to say, whether he has received or expects to receive any consideration, pecuniary or other, in respect of his testimony, or whether he is actuated by malice towards the party against whom he is adduced. The examination, which is conducted either by the Sheriff or the party against whom the witness is called, serves little purpose and is practically obsolete.[3]

*Examination in Chief.*—The party appointed to lead in the proof leads his evidence in support of his averments, and at the same time his evidence counter to the averments of the defender, and he is entitled to continue his examination until he exhausts it, without interruption from any quarter, save where objection is taken to the legality or competency of a question. The witness may then be cross-examined by the agent on the opposite side, who is entitled to continue his examination without interruption till he exhausts it, and he may be examined not only in cross but *in causa.* Then the agent who examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in the cross-examination, unless with the permission of the Sheriff. The agent who has cross-examined has no right to cross-examine a

[1] *See* M'Lauchlin *v.* Douglas, 1863, 4 Irv. 273.

[2] Anderson *v.* M'Farlane, 1899, 1 F. (J.) 36.

[3] *See* H. M. Adv. *v.* Reid, 1883, 2 Coup. 415.

second time, but he may be allowed to put questions directly to the witness or through the medium of the Sheriff for the purpose of making explicit matters which the re-examination has left doubtful. Where the agent in cross-examination has at the same time examined the witness *in causa* in reference to matters not raised in the examination in chief, the Sheriff may similarly allow him to re-cross-examine the witness for the purpose of clearing up matters left doubtful by his opponent's re-examination. The Sheriff is entitled at any time during the course of the examination or cross-examination, or after both are finished, to put to the witness any question which may suggest itself to him.[1]

*Cross-Examination.*—The object of the cross-examination is of course to elicit the truth of the averments made by the party whose agent conducts the cross-examination, and to prove the falsity of those made by his opponent. The aim of the cross-examiner must therefore be to diminish the value of the witness's testimony, either by shaking his credibility and showing that his evidence is untrustworthy, or by proving from the witness's own admissions that his opportunities of observing the facts or of forming a sound opinion upon his observations were inferior to those of the witnesses adduced or to be adduced by the opposing agent. No specific rules for guidance in cross-examination can be given, but generally it may be stated that while the ability to cross-examine effectively can be acquired, if at all, only by long practice and assiduous labour, no branch of pleading is less understood or more liable to abuse than that of cross-examination. Except in skilled hands, cross-examination is more likely to do harm than good. It may, however, be hinted that a cross-examination should not be unduly prolonged, and that the questions asked should be as much as possible those to which the witness is able to return a categorical answer. A witness cannot be prevented from adding any explanation he desires with reference to an answer he has given, though, if his explanation be not relevant to the question put, the agent may object to its inclusion in the evidence. If the party cross-examining intends to adduce the witness as a witness in support of his averments, he may reserve his cross-examination until he examines him in chief, though since by so doing he gives his opponent two opportunities of examining

[1] *See generally*, 3 & 4 Vict. c. 59, s. 4; A. S. 1841, s. 28; Dickson on Evidence, s. 1977.

the witness instead of one, such a course is seldom expedient, and should not be resorted to unless the opposite course would be clearly prejudicial to the case.

*Questions competent.*—A question put to a witness must in the first place be relevant, that is, it must be pertinent to the issue between the parties; in the second place, it must be of such a kind as might reasonably be anticipated either from the nature of the case or from the averments on record; and, in the third place, it must be fair, and not purposely misleading. Leading questions, or those which suggest the answer desired, are therefore incompetent where their use is unfair. Thus, in an examination in chief, such questions are, generally speaking, incompetent, because the witness, being adduced by the party examining him, naturally inclines to answer the questions put as favourably as may be, and may therefore, consciously or unconsciously, be biassed or induced to adopt the phraseology suggested to him. In cross-examination, on the other hand, the witness is presumably hostile, and therefore such questions are not necessarily unfair, unless they are purposely misleading or put with the object of entrapping the witness into a deviation from the truth. For the same reason leading questions may be admissible in an examination in chief where the witness obviously fails to understand the purport of the questions put to him, or where he unexpectedly proves hostile, though in such cases the evidence should be recorded in the form of question and answer. As a witness is adduced to give evidence as to facts so far as they are within his own knowledge, it is misleading and therefore improper to ask questions which imply the existence of a state of facts other than those of which he is cognisant, or which assume as true facts which have neither been admitted or proved to be true, or which infer that answers previously given by him are contradictory of those he now gives. Some latitude with regard to such questions is however permissible in cross-examination. A question may mislead where it embraces two distinct and it may be contradictory propositions, if the object of it be to induce the witness to make his answer a single affirmative or negative of both. While at one time it was incompetent for a party to discredit a witness whom he had adduced, it is now competent to examine such a witness as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence he now

gives; and it is competent to prove in the course of the action that the witness has made such a different statement on the occasion specified.[1] But a foundation must be laid for the introduction of such contradictory proof, by interrogating the witness not only as to his having made a different statement, but also as to the time, place, and person, when, where, and to whom such statement was made, in order that by aiding the memory of the witness in recalling if he can the circumstances, he may not be taken at a disadvantage.[2] But a witness cannot be contradicted by what he has said on precognition, nor can he be asked if on precognition he made a statement contradictory or different from that which he makes on oath in the witness-box. For similar reasons, a deposition provisionally taken to lie *in retentis* cannot be put in evidence to contradict the testimony which the witness subsequently gives orally in Court. The deposition itself cannot be used as evidence, since it is superseded by the evidence of the witness, and therefore the report of the commission is not evidence at all. In one case the deposition of a bankrupt made in the course of his statutory examination was allowed to be produced for the purpose of contradicting his oral evidence in Court,[3] but, as was pointed out, such a deposition bears no analogy to one taken to lie *in retentis*.[4]

Except in cases in which the witnesses are adduced as "experts," witnesses must be interrogated and must depone solely as to *facts* within their knowledge. It is therefore incompetent in general to ask a witness his opinion or impression as to facts, or to invite an expression of his opinion with reference to the law involved in his statement of facts. Thus it is obviously incompetent in general to ask a witness who, in his opinion, was responsible for a collision, since the question of responsibity is one of law and not of fact, and is either for the judge or the jury to decide. So it is incompetent in an action for defamation to ask the witness whether in his opinion the words used amounted to a slander. His duty in both cases is to recite the facts as they came under his observation and to leave all matters of inference or law to the judge or jury. A skilled witness, on the other hand, such as a medical man, may competently

[1] Evid. Amend. Act, 1852, s. 3.

[2] Gall *v.* Gall, 1870, 9 M. 177, *per* Ld. Pres. Inglis.

[3] Emslie *v.* Alexander, 1862, 1 M. 209.

[4] Forests *v.* Low's Trs., 1907, S.C. 1240.

be asked whether a certain state of matters is, in his opinion, consistent with the evidence given by the witnesses as to facts. But the rule is not absolute, and a witness may in certain cases be competently interrogated with reference to his opinion or his impression derived from his observation of the facts. Thus, in the examples just given, a witness might competently be asked whether, from his observation of the actual facts which transpired at the time, the collision might in his opinion have been averted by the exercise of certain precautions or of reasonable care on the part of either of the parties. Or, if he were a witness to the actual utterance of defamatory words complained of, he might competently be interrogated as to whether in his opinion the words complained of were uttered *in rixa* or in joke. But a witness who is not an expert can be asked his opinion or impression as formed by him on observed facts. To ask him questions involving matters of opinion on facts otherwise proved would constitute his evidence that of an expert. A witness may be allowed to refresh his memory by a reference to notes or jottings made by him at or about the time of the happening of the events with reference to which he gives evidence, but any such documents must be exhibited to the agent of the opposite party if he so desire. Notes made recently or under instructions are inadmissible.

A witness is not bound to answer a question which may incriminate him, and it is the duty of the presiding judge to apprise him of that fact. It is, however, competent, for the purpose of discrediting a witness, to question him with reference to previous convictions, provided the question is strictly pertinent to the issue. But since the fact that a witness, whose presence in Court may be wholly against his own will, is not necessarily untruthful because he has previously (and it may be many years before) been convicted of crime, and because, except in circumstances where such a course is practically unavoidable, to seek to discredit a witness by needlessly publishing prior delinquencies is not merely a refinement of cruelty but an action which is more likely to bring discredit on the agent than on the witness, such questions should be avoided. In any event the credibility of the witness is a matter largely for the presiding judge, and where the credibility of a witness is involved it must not be forgotten that to the opinion of the judge who saw the witness and heard him give his evidence will be attached very

great weight.[1] To seek, therefore, to unfairly discredit a witness's evidence may defeat its end by inducing the presiding judge to express an opinion favourable to his credibility, which otherwise might have been withheld as being unnecessary. It seems unnecessary to add that, except in certain cases where a witness appears to be prevaricating or concealing the truth, he should be treated with the ordinary courtesies of social intercourse which are due as much to the judge as to the witness himself, and that questions which are framed or put in an offensive spirit, or are dictated by the desire to intimidate or "bully" the witness, are evidences rather of the questioner's incapacity and lack of breeding than of the justice of his case.

*Objections to Evidence.*—A question may be objected to on the ground that it is incompetent or irrelevant, or that its answer will involve the disclosure of information which is confidential. A question may be incompetent by reason that no sufficient foundation for it has been averred on record, as where it is attempted to prove malice in the absence of averments on record from which malice can be inferred, or by reason that parole proof is inadmissible, as where the terms of a written contract are sought to be explained or contradicted by evidence of custom.[2] A question may be irrelevant where its answer, even if true, is not pertinent to the issue between the parties to the cause. And a question may be objected to if its answer will involve the disclosure on the part of the witness of facts, the knowledge of which has been imparted to or acquired by him under circumstances which make such information confidential.[3] Similarly, a witness may be called upon, but cannot be compelled against his wish, to produce documents which are confidential, or over which he possesses a right of hypothec or of property. All such objections must be taken timeously, that is, neither too soon nor too late.[4] An objection to a particular question may involve objections not only to the question itself, but to the line of examination, of which the question is merely the beginning or foundation. When an objection is taken at the commencement of a

[1] Burrell & Son *v.* Russell & Co., 1898, 36 S.L.R. 250; Manners *v.* Whitehead, 1898, 1 F. 171.

[2] Maclellan *v.* Peattie's Trs., 1903, 5 F. 1031.

[3] The plea of confidentiality may be waived by the person affected by the disclosure.

[4] *See* Kirkwood *v.* Kirkwood, 1875, 3 R. 235; Ritchie *v.* Barton, 1883, 10 R. 813.

particular line of examination, it applies to all that follows in the same line, and need not be repeated.[1] If, therefore, on appeal the objection be sustained, the whole evidence following it will be held incompetent. When an objection to a question is sustained or repelled by the Sheriff, the objection and the answer to it (if any), if the objector so desire, is shortly noted on the notes of evidence to the Sheriff's (or the Commissioner's) dictation, and the examination of the witness proceeds.[2] If the Sheriff (or the Commissioner) deem the objection of sufficient importance, he may direct the evidence objected to to be taken on a separate paper.[2] The objection, whether sustained or repelled, is noted only when the objector requests the Sheriff (or the Commissioner) to do so. During the course of the proof it is incompetent to submit to review any judgment pronounced upon the competency of the evidence, but on the proof being declared closed, or within seven days thereafter, if the Sheriff-Substitute has not pronounced judgment in the interval, it is competent, by the Sheriff-Substitute's leave, to appeal to the Sheriff upon objections to the admissibility of evidence taken during the course of the proof.[2] Thereafter the Sheriff, either with or without a hearing in his discretion, disposes of the appeal with the least possible delay. If he thinks that evidence accepted should not have been allowed, he may delete it from the notes of evidence; and conversely, if he is of opinion that evidence has been improperly rejected, he may appoint it to be taken before the case is advised on the merits.[3] Similarly, if any person, whether a party to the cause or other person, plead before the Sheriff-Substitute confidentiality with reference to documentary or oral evidence, or, on pleas of alleged hypothec or otherwise, objects to produce documents, the Sheriff-Substitute, on the notes of evidence, minutes his decision on such pleas, and any party in the cause or the party pleading confidentiality may, with leave of the Sheriff-Substitute, in open Court take an appeal to the Sheriff, who, without a hearing and with the least possible delay, disposes of it.[4] But such incidental appeal as to the confidentiality of a document sought to be produced, does not remove the cause from the Sheriff-Substitute, who proceeds with it as regards points not necessarily dependent upon the ruling appealed against.[5] The cause, in other words,

[1] M'Kenzie *v.* Brodie, 1859, 31 Jur. 591, *per* Ld. Pres. Inglis.
[2] Act, Rule 74.
[3] Act, Rules 74, 75.
[4] Act, Rule 76.
[5] Act, Rule 77; Act, 1853, s. 18.

proceeds without interruption before the Sheriff-Substitute, but his judgment on any point connected with the competency or admissibility of evidence may be submitted to the Sheriff for review after the proof is closed, but before judgment is pronounced; whilst pleas with reference to the confidentiality of evidence, oral or written, are disposed of summarily with the least possible delay, and where practicable apparently before the proof is closed. The judgment of the Sheriff is, however, final in both cases at this stage of the cause. If, after judgment on the merits, the cause is appealed to the Court of Session, such appeal submits to the review of that Court the whole of the interlocutors pronounced in the cause, including of course those dealing with the competency or admissibility of evidence,[1] oral or documentary.

*Evidence of Bankers.*—The Bankers' Books Evidence Act of 1879 provides that a copy of any entry in a banker's book is to be received in all legal proceedings as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded. The copy must, before it can be received as evidence, be proved to have been examined with the original entry and to be correct, and that it is taken from a book which at the time of making the copy was one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank. The proof may be given by a partner or an officer of the bank, or by a person who has examined the copy with the original entry, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits. But in any legal proceeding to which the bank is not a party, such partner or officer cannot be compelled to produce the book, the contents of which are to be proved, or to appear as a witness to prove the matters, transactions, or accounts therein recorded, unless by order of the judge made for special cause. On the application of any party to a legal proceeding, the Sheriff may order that such party shall be at liberty to inspect and take copies of any entries in a banker's books for the purpose of such proceedings, and this order may be made without summoning the bank or any other party, but it must be served upon the bank three clear days before it requires to be obeyed, unless the Sheriff orders otherwise.

[1] Act, s. 29.

*Recalling Witnesses.*—Any witness who has been examined in the course of a proof may, in the discretion of the Sheriff and on the motion of either party, be recalled.[1]

**Recording the Evidence.**—The Act of 1907 has materially amended the law relating to the recording of the evidence. Prior to that Act the evidence might be recorded either in longhand or shorthand. If recorded in the former way, it required to be written by the Sheriff himself, he having been instructed not to dictate to a clerk except when unavoidably prevented from writing. The evidence was recorded not by way of question and answer, but in the form of a narrative, though if the Sheriff thought it advisable there was nothing apparently to prevent him recording any particular portion of the evidence by way of question and answer. Where the evidence was recorded in shorthand the services of a shorthand writer were requisitioned, and the Sheriff dictated to him the evidence which he was to record, with a note of the documents adduced and any admissions made by the parties. The practice, gradually introduced, of allowing the shorthand writer to take down the evidence without dictation, had no statutory sanction, but, owing to its convenience and the absurdity of the statutory provisions, that method became practically universal. The Act of 1907 sanctions the recording of the evidence in longhand by the Sheriff, or a clerk nominated by him, in narrative form, and the provision may be useful in avoiding the expense connected with the employment of a shorthand writer in cases where the witnesses are expected to be few and the evidence short. But in practice the employment of a skilled shorthand writer may be expected to be practically of universal adoption. The Act provides that in a cause, whether before a Sheriff or a Commissioner, the evidence may be taken down by a shorthand writer nominated by the Sheriff or the Commissioner, to whom the oath *de fideli administratione* is administered, and the evidence may be recorded either in narrative form or by question and answer, as the Sheriff or the Commissioner may direct. The extended notes of the evidence, certified by the shorthand writer, become the oral evidence in the cause.[2] The Act provides that the Sheriff or the Commissioner may, if he think fit, dictate to the shorthand writer what he is to record,[2]

[1] The Evidence (Scotland) Act, 1852, s. 4; Robertson *v.* Stewart, 1874, 1 R. 532; Hoey *v.* Hoey, 1884, 11 R. 578; *but see* Begg *v.* Begg, 1887, 14 R. 497.

[2] Act, Rule 65.

but as a narrative of the evidence in the *ipsissima verba* of the witnesses themselves must be generally preferable to a second-hand paraphrase of their meaning, however brilliant or concise, the statutory provision is not likely to be largely taken advantage of in practice. In the Court of Session, where the evidence is never dictated, the presiding Judge certifies the correctness of the record. In the Sheriff Court that duty is thrown upon the shorthand writer, but though under the provisions of the Act the practice of the two Courts in the matter of the recording of the evidence is now, to all intents and purposes, identical, the method adopted in the Sheriff Court seems preferable.

*Amendment of the Record of Evidence.*—If the correctness of the notes of evidence or of a deposition be questioned, the Sheriff may satisfy himself in regard thereto by the examination of the witnesses or otherwise, and he may amend the record of the evidence or deposition.[1] The meaning of this provision is somewhat obscure, but it seems at any rate to make it competent for the Sheriff to make a correction on the notes of evidence, though certified as correct by the shorthand writer, where such correction is justified by his personal recollection of what the witness actually said, or where, for instance, the official record differs from the recollection of what transpired of the agents and parties who were present in Court when the evidence was led. It will not be forgotten that in some Sheriff Courts, more or less distant from the centres of industry, the services of a thoroughly qualified and experienced shorthand writer are sometimes unobtainable, and the provisions of the Act may well prove of great utility in certain cases.

*Shorthand Writers' Fees.*—When a shorthand writer is employed to record the evidence, he is paid in the first instance by the parties equally, and the agents of the parties are personally responsible for his fees. It is competent for the Sheriff to make an order directing payment to be made.[2] The cost of transcribing the shorthand writer's notes must apparently be paid by the unsuccessful party, though no use be made of them.[3]

**Declaring Proof Closed.**—At the close of the proof or at an

[1] Act, Rule 66 ; Evidence Act, 1874, s. 4 (2).

[2] Act, Rule 67 ; Evidence Act, 1874, s. 4 (2).

[3] Marshall *v.* Shearer Bros., 1903, 11 S.L.T. 71 (O.H.).

adjourned diet, unless for any reason the Sheriff sees fit to postpone the hearing, the Sheriff hears parties or their agents, and thereafter pronounces judgment with the least possible delay.[1] The Act does not in terms provide that there shall be an interlocutor expressly declaring the proof closed, and such an interlocutor is not perhaps, strictly speaking, necessary, since the proof if not adjourned automatically closes of itself, the agents on each side respectively declaring their proof closed. Rule 75, which deals with incidental appeals on the question of the admissibility of evidence, provides that such appeals are competent "on the proof being declared closed." The Act of 1876 peremptorily directed that the debate on the proof should take place either at its close or at most within seven days thereafter.[2] In practice, the strict observance of the statutory provisions was often attended with hardship, and was not infrequently found to be impossible. As the Sheriff has now power to adjourn the diet from time to time, and for such periods as the necessities of the case appear to require,[3] every reasonable opportunity for becoming acquainted with the evidence of witnesses, or the contents of documents produced or referred to as the diet of proof, may be afforded to the parties or their agents.

**Additional Proof.**—After the proof has been declared closed, it is incompetent for the Sheriff to allow additional proof, either *ex proprio motu* or on the motion of either or both of the parties. Under the provisions of the Act of Sederunt of 1839, additional proof might be allowed, upon very weighty cause shown and upon payment of such expenses as might be deemed proper, by petition to the Sheriff, in which the facts to be proved and the witnesses who were to prove them were particularly set forth. The Act of 1907 makes no provision for obtaining or allowing additional proof after the proof is declared closed. Under the Act of 1876, the Sheriff, on appeal, might open up the record, and he might also allow further proof.[4] The power thus granted of allowing additional proof was an innovation upon former practice and procedure, under which further proof was only competent if it were granted in terms of the Act of Sederunt of 1839.[5] Under the provisions of the Act of 1907, regulating appeals to the Sheriff, the power of opening up the record

[1] Act, Rule 78.
[2] Sec. 23.
[3] Act, Rule 69.
[4] Act, 1876, s. 28 (3).
[5] *See* Mabon *v.* Cairns, 1875, 3 R. 47.

or of allowing further proof is no longer conferred on the Sheriff. It would appear, therefore, that in the event of additional proof being necessary or advisable, such an order can only be pronounced by the Supreme Court, on appeal, in the exercise of its equitable jurisdiction. But no doubt in any case such proof will be allowed only if necessary in the interests of justice, and subject to the payment of expenses by the appellant. Thus additional proof has been allowed where plans were discovered after the proof had been closed;[1] but it has been refused where the object was to examine a witness who should and might have been adduced at the proof,[2] to re-examine a witness who was alleged to have been suborned to give false evidence,[3] and in cases where the object of the additional proof was to enable a party to prove a branch of the case which *per incuriam* had been overlooked at the proof.[4] In any event, additional proof is permissible only where proof has actually been led; and where the parties agree to renounce probation and lodge a minute to that effect, a proof will not be afterwards allowed.[5]

**Proof in Replication,** or a proof in reply to the conjunct proof of the opposite party, is very rarely sanctioned, but if sufficiently strong reasons are advanced, it may be allowed by the Supreme Court in the same way as additional proof.[6]

[1] Reid *v.* Haldane's Trs., 1891, 18 R. 744; *see* Johnston *v.* Johnston, 1903, 5 F. 336; Coul *v.* Nor. Dist. Committee of Ayr C.C., 28 Jan. 1909, 1 S.L.T. 144.

[2] Mabon *v.* Cairns, *sup.*; Stott *v.* Allan, 1893, 20 R. 804.

[3] Brown *v.* Gordon, 1870, 8 M. 432.

[4] Cruikshank & Co. *v.* Cal. Rly. Co., 1876, 3 R. 484; Glengarnock Iron Co. *v.* Cooper & Co., 1895, 22 R. 672.

[5] Carsewell & Son *v.* Finlay, 1887, 24 S.L.R. 643.

[6] *See* Gairdner *v.* Young, 1874, 2 R. 173; Strang *v.* Stewart, 1862, 24 D. 955; Rankin *v.* Roberts, 1873, 1 R. 225.

# CHAPTER XIV

## THE HEARING ON EVIDENCE AND JUDGMENT

### I. The Hearing on Evidence

The hearing on evidence[1] is taken either at the close of the proof or at an adjourned diet. The statutory direction is that the Sheriff shall hear the parties or their agents at the close of the proof, or, if he see fit to adjourn the diet, at such adjourned diet. In the Court of Session the statutory rule is that the evidence shall be "summed up" by one counsel on each side at the conclusion of the examination of the witnesses as in the case of jury trials. If the defender have led no evidence, the pursuer's counsel has no reply.[2] Though the Act makes no express provision on the point, it is in accordance both with previous practice and with that of the Supreme Court that the agents of parties should respectively "sum up" the evidence only once. With the Sheriff's permission, though not, it is thought, as matter of right, the agent who opens may be allowed a reply to any new matter which his opponent may have brought forward, or which he may have omitted in his opening statement. At the hearing it is competent to refer only to such documents as have either been put to the witnesses or have been admitted of consent.[3] With the exception of such as are technically known as "expert" witnesses, the evidence of witnesses is confined exclusively to matters of fact of which they have personal knowledge. It must

[1] The word "debate" is sometimes applied to the hearing on evidence. It would, however, perhaps be more convenient, as it would certainly be more logical, to confine the use of the word "debate" to the legal argument submitted by the parties on the closed record, and to describe the summing up of the evidence after the proof is closed as a hearing on evidence. The use of such nomenclature would tend to further assimilate the practice of the Supreme Court and of the Sheriff Court, which would appear to be one of the objects of the Act of 1907.

[2] Macfarlane's Jury Practice, p. 125.

[3] Neill's Trs. *v.* Brit. Linen Bank, 1897, 5 S.L.T. 214 (O.H.).

not be forgotten that the Court can listen to theories and even mathematical demonstrations deduced from the evidence of the witnesses as to matters of fact only when such theories have been put to the witnesses themselves, since such theories or demonstrations, though apparently logical and even necessary inferences from the facts, may be susceptible of comparatively simple explanations entirely destructive of the inference drawn.[1]

## II. The Judgment

At the close of the hearing on evidence, the Sheriff either pronounces judgment forthwith or takes the cause to *avizandum*. In any event it must be embodied in writing, and it must be pronounced with the least possible delay. To all interlocutors, except those of a formal nature (including those disposing of preliminary defences, sisting process, deciding on the admissibility or competency of evidence, or of pleas of confidentiality, granting interim decree, or disposing in whole or in part of the merits of the cause), the Sheriff must append a note setting forth the grounds upon which he has proceeded, and in his final judgment on the merits he must set forth his findings in fact and in law separately.[2] A final judgment means an interlocutor which by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for.[3] The provision that the findings in fact and in law respectively must be separately expressed is of such vital importance that an objection on the ground of non-compliance cannot be waived.[4] It is not sufficient compliance with the statutory provision that such findings have been separately expressed in the note to the interlocutor.[5] The interlocutor should contain findings not only of every fact on which judgment is based, but of all relevant facts, even though they are not material to the ground of judgment.[6]

[1] Crawford *v.* Granite City SS. Co., 1906, 8 F. 1013 ; *see* Lord Low's opinion.

[2] Act, Rule 82 ; A. S. 1851 ; Act, 1853, s. 13.

[3] Act, s. 3 (h).

[4] Glasgow Gas Light Co. *v.* Glasgow Working-Men's Abstin. Socy., 1866, 4 M. 1041 ; Melrose *v.* Spalding, 1868, 6 M. 952 ; Mackay *v.* Mackenzie, 1894, 21 R. 894.

[5] M'Caffer *v.* Allan, 1896, 33 S.L.R. 601.

[6] Little *v.* Stevenson, 1896, 23 R. (H.L.) 12, *per* Ld. Herschell.

The Act of Sederunt of 1851 required that the Sheriff should not only specify the several facts material to the case which he found established by the proof, but also that he should express how far his judgment proceeded on the matter of fact so found or on the matter of law, and the several points of law which he meant to decide. And the Act of 1853 required that either in the interlocutor or the note appended to and issued along with it, the Sheriff must specify the grounds on which he had proceeded. The Act of 1907 combines, though it essentially modifies these two provisions, by requiring the Sheriff in a final interlocutor to state separately his findings in fact and in law in the interlocutor, and to set forth the grounds on which he has proceeded in the note.[1]

The judgment should be authenticated on each page by the Sheriff's signature, and marginal notes should also be signed. Interlineations and erasures in parts of the judgment which are not material do not affect its validity.[2] The Sheriff may pronounce or sign any judgment or interlocutor when furth of his Sheriffdom, but the date of every interlocutor is deemed to be the date upon which it is entered in the books of the Court.[3] At any time before extract, or before the transmission of the process where an appeal has been taken, the Sheriff may correct any clerical or incidental error in his judgment.[4] It is somewhat significant that the Act of 1853 allowed the correction of any "merely clerical error," while the Act of 1876 permitted the correction of any "merely clerical or accidental error." It is, however, incompetent after judgment has been issued to make material amendments.[5] Where, however, an interlocutor bears to be "of consent" and either party denies t at his consent was given, the Court of Session on appeal will allow an inquiry.[6] If, therefore, the terms of the judgment are vague or ambiguous, the defect can be remedied only by the Sheriff or the Court of Session on appeal. In any event, a second judgment interpreting the first is incompetent.[7] All alterations, corrections, and additions should be authenticated by the Sheriff's initials, though if the corrected interlocutor

[1] *See* instructive observations on the subject in Mackay *v.* Dick, 1881, 8 R. (H.L.) 37; Shepherd *v.* Henderson, 1881, 9 R. (H.L.) 1; Caird *v.* Sime, 1887, 14 R. (H.L.) 37; and Little *v.* Stevenson, *sup.*

[2] Dowie *v.* Barclay, 1871, 9 M. 726.

[3] Act, Rule 83.

[4] Act, Rule 84.

[5] Moncrieffe *v.* Perth Police Comrs., 1886, 13 R. 927.

[6] Whyte *v.* Whyte, 1895, 23 R. 320.

[7] Edingtons *v.* Astley, 1829, 8 S. 192.

correctly expresses the judgment of the Court the fact that alterations are not authenticated will not necessarily invalidate it.[1] An interlocutor granting decree for payment of a sum of money without interest may be altered so as to include interest if the Court in pronouncing judgment meant actually to do so.[2] An interlocutor pronounced in error may be cancelled.[3] The judgment must be warranted by the crave in the initial writ. It must not, therefore, give the pursuer a remedy other than that which he craves, nor must it give decree in his favour for more than he asks. Where the initial writ craves decree for a specified sum, or alternatively for such sum as may be found due, a decree for a sum in excess of that specified is competent, since it is justified by the terms of the crave.[4]

The interlocutor by itself, or taken along with previous interlocutors, must "dispose of the subject-matter of the cause." It must therefore (1) decern in terms of the conclusions, (2) assoilzie the defender (*a*) from the conclusions of the initial writ, or (*b*) from the conclusions of the writ "as laid," or (3) dismiss the action. Provided it dispose of the whole cause, an interlocutor may deal with one or more parts of the case in any of these different ways. The use of the word "decerns" is no longer indispensable to allow extract of an interlocutor in the Sheriff Court.[5] It may, however, be properly used to sanction the enforcement of an interim or final order by such diligence as the law allows,[6] or to indicate that the subject-matter of the cause is finally disposed of.[7] Unless the question of expenses has been decided, the interlocutor does not dispose of the subject-matter of the cause,[8] though it is not necessary that they should be actually decerned for.[9] Where a Sheriff pronounced a decree *ad factum praestandum* but refused to deal with the question of expenses till the expense of operations he had ordered was ascertained, the Court suspended the decree with the object of sisting execution.[10] The Act of Sederunt of 1839 expressly enjoined the Sheriff, when

[1] Clark & Macdonald *v.* Bain, 1895, 23 R. 102.

[2] Marshall *v.* Cal. Rly. Co., 1899, 2 F. 6.

[3] Rottenburg *v.* Duncan & Others, 1896, 24 R. 35.

[4] Spottiswoode *v.* Hopkirk, 1853, 16 D. 59.

[5] Act, 1876, s 32.

[6] Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147, *per* Ld. Shand.

[7] Shand's Prac. ii. 594.

[8] Burns *v.* Waddell & Sons, 1897, 24 R. 325; Glasgow Corpn. *v.* Cal. Rly. Co., 1900, 37 S.L.R. 672.

[9] Act, s. 3 (h).

[10] Cal. Rly. Co. *v.* Cochrane's Trs. 1897, 24 R. 855, *following* Wilson *v.* Bartholomew, 22 D. 1410.

disposing of the merits of the cause, to determine the matter of expenses so far as not already settled. It was a matter of some doubt whether formerly, if a finding of expenses were omitted from the interlocutor *per incuriam*, the omission could be subsequently supplied. There seems, however, under the provisions of the Act of 1907 with reference to the correction of incidental errors, nothing to prevent the Sheriff adding a finding as to expenses which has been omitted *per incuriam*, provided he do so before extract or transmission of the process. In the Court of Session, where an interlocutor which exhausts the merits of the cause is allowed to become final, and is silent on the subject of expenses, the question cannot be re-opened so as to enable the Lord Ordinary to make an award of expenses.[1]

[1] Wilson's Trs. *v.* Wilson's Factor, 1869, 7 M. 457; Fraser *v.* Fraser, 1903, 11 S.L.T. 33 (O.H.).

# PART III

## PROCEDURE INCIDENTAL TO ORDINARY ACTION

# CHAPTER XV

## CALLING AND SISTING NEW PARTIES


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**Generally.**—During the course of a process it may become expedient or necessary that new parties should be added either as pursuers or defenders. The necessity or expediency may arise from the fact that such parties were omitted at the time when the action was raised, or from the fact that during the progress of the case such parties have acquired an interest in the subject-matter which they did not formerly possess. Upon the motion of either party, the Sheriff may, at any stage of the cause, and upon such conditions as to expenses, re-service, or otherwise as he may deem proper, allow an amendment of the instance and of the initial writ and the addition of parties, notwithstanding that the conclusions of the action are thereby enlarged or altered.[1]

**Omitted Pursuers.**—Formerly an additional and independent pursuer could not be called as a party to the cause without the consent of the defender, though to the general rule there were a few exceptions. If a necessary pursuer had from any reason been omitted, a new action or at least a supplementary summons became imperative. The rule was applied to the addition not only of such pursuers as might or should have appeared in the instance originally,

[1] Act, Rule 79.

but to such as were independent of the original pursuers and not connected to them by any definite bond of relationship, such, for example, as that which subsists between a tutor and his pupil, or between a cedent and his assignee.[1] The rule which seems to have applied chiefly to cases where the defender abstained from objecting to the instance[2] was repeatedly enforced,[3] and although doubts as to its expediency had been expressed,[4] it was re-affirmed in a comparatively recent case, where an exception to the rule was allowed.[5] Thus, where in the initial writ the name of one of two joint owners of a ship was omitted, an amendment of the instance by the addition of the omitted pursuer was refused.[3] And in the more recent case where the rule was re-affirmed a means of escape was devised by allowing the new pursuer to be sisted as "a party concurring with the pursuer."[4] Under the provisions of the Act of 1907 the consent of the defender to the addition of a new pursuer is no longer necessary, and such a pursuer may be added at any time, subject only to such conditions as to expenses, re-service, or otherwise as the Sheriff may see fit to impose. Where pursuers, who ought to have appeared in the original instance, require to be added in order to make the instance good, as in the case of a minor raising an action without his curator's consent, or of a wife suing an action with reference to her own property in her own name without her husband's consent for his interest, an amendment of the instance will generally be allowed, subject only to an award of such expenses as may have been occasioned by the omission. Where the concurrence of a party who has been omitted is necessary to make the instance good, the consent of such omitted pursuer must, however, if the defender takes the objection, be obtained before the action can be allowed to proceed. Where, however, a party who should have been a pursuer has been omitted because his consent to the proceedings cannot be obtained, as where a party who has nominally the right to sue has divested himself of his interest in favour of some one who prefers not to appear as a pursuer, it is not in general necessary that the party really interested should

[1] *See* Fraser *v.* Duguid, 1838, 16 S. 1130.

[2] Bryson *v.* Crawford, 1833, 12 S. 39; Remington *v.* Bruce, 1829, 7 S. 692.

[3] *See* Anderson *v.* Harboe, 1871, 10 M. 217, *and cases cited.*

[4] Dove Wilson, 4th ed. 233.

[5] Morison *v.* Gowans, 1873, 1 R. 116; Hislop *v.* M'Ritchie, 1881, 8 R. (H.L.) 95, Ld. Watson's opinion.

come forward under penalty of having the action dismissed if he refuses; but if, on being required to do so, he fails or refuses to allow his name to be added as a pursuer, the actual pursuer may be required to find caution for expenses.[1] Thus, where a wife, resident in England, without her husband's consent raised an action which the trustees of a trust in which she was beneficially interested declined to prosecute, she was required to find caution for expenses.[2]

**Omitted Defenders.**—Formerly a pursuer could not call or sist a new party as defender to the action by incident diligence,[3] or by a motion merely to that effect. In the case of additional and independent defenders being required, who were not made parties to the original action, a supplementary summons, by which such defenders were duly cited, was the only competent procedure. But where a party had become divested by bankruptcy, disposition, assignation, or otherwise, a motion might be competently made that intimation should be given to the trustee, disponee, or assignee of the dependence of the action, so that he might if so advised sist himself as a party. He could not, however, be compelled to do so. Similarly the proper representative or guardian of a defender, whose title had emerged *pendente lite*, as in the case of a husband of a defender who married, or a curator who has been appointed during the dependence of the action, might be called as a party to the action by intimation being made to him. But if such representative or guardian were in existence at the date when the action was raised, and were omitted *per incuriam*, a supplementary summons was necessary in every case in which objection was raised to their sisting themselves as parties.[4] Thus, when the defender was not *sui juris*, and the pursuer had omitted to call as a defender the person without whose authority the actual defender was unable to act,[5] or where there were others interested in the action besides those actually called as defenders,[6] the pursuer might be appointed to cite the omitted parties on his own motion on discovering the omission, or on that of the defender, or *ex proprio motu* of the

[1] Waddel *v.* Hope, 1843, 6 D. 160.
[2] Teulon *v.* Seaton, 1885, 12 R. 1179.
[3] Chanter & Co. *v.* Thomas, 1845, 7 D. 465.
[4] Dalgleish *v.* Hamilton, 1752, M. 2184.
[5] Thomson *v.* Livingston 1863, 2 M. 114.
[6] Thomson *v.* Gilkison, 1831, 9 S. 520; Geddes *v.* Hopkirk, 1827, 5 S. 747.

Sheriff,[1] or the parties interested might apply voluntarily for leave to appear.[2] In cases where the actual defender had a right of relief, or might have incurred liability to others who were not called as parties, or in cases of persons having an interest to defend, the Court might order intimation with the object of affording such persons an opportunity of sisting themselves as defenders if so advised. The pursuer could not be obliged, however, to call parties against whom the defenders had a right of relief,[3] nor even (it was said) to consent to their admission into the process,[4] nor was he bound to call persons to whom the defenders might incur liability in the event of his succeeding.[5]

The calling of a new defender, under the provisions of the Act of 1907, now becomes merely a matter of amendment of the initial writ, competent on the motion of either of the parties, and subject in the discretion of the Sheriff to such conditions as to expenses, re-service, or otherwise, as he may see fit to impose. The Act makes no provision for the mode in which intimation is to be made to a new defender, and the matter is left in the discretion of the Sheriff. In general, intimation will probably be effected by means of a registered postal letter, though in certain cases, such as where the new defender is outwith the jurisdiction of the Sheriff, service by Sheriff officer may be necessary or at least prudent. If, for example, a minor or other person incapable of being sued alone, is called as a defender, while his father or other legal guardian is alive, and objects to the competency of the action on the ground that such guardian has not been made a party, the proper course is for the Sheriff to order intimation of the action to such person, in order to afford him the opportunity of sisting himself if so advised, and if after intimation he declines or fails to sist himself, to appoint a curator *ad litem*. No person can, of course, be forced to become a litigant. Where, therefore, a pupil or a minor declines to be a litigant in the cause, the Court does not possess the right to appoint a curator *ad litem*, on the principle that the rights and interests of a young person are not to be affected by an action raised against

[1] Laird's Assignees *v.* Murray's Trs., 1836, 15 S. 120.

[2] Butchard *v.* Prophet, 1841, 3 D. 1040; Glasgow Shipowners' Assn. *v.* Clyde Navigation Trs., 1885, 12 R. 695.

[3] Binny *v.* Machray, 1841, 10 D. 1508.

[4] *See* Wishart *v.* Motherwell's Trs., 1851, 13 D. 1100.

[5] Shaw *v.* Cal. Rly. Co., 1888, 15 R. 504.

him in any way which may affect his asserting any right he may have when he comes of age to act for himself.[1] Where the new defender is not subject to the jurisdiction in respect that he is a foreigner, jurisdiction must generally be constituted against him before he can be made a party to the action.

**Sisting new Parties.**—The introduction of now parties frequently becomes necessary in consequence of changes occurring during the course of the process.

*Pursuers.*—Where a pursuer dies *pendente processu*, his representatives, as his heir, executor, or assignee, may sist themselves as parties to the suit, all that is necessary being that a minute should be lodged on their behalf craving to be sisted in place of the original pursuer, and that a motion be made to have the minute sustained. Where property which forms the subject of the litigation is transferred during the course of the action from the pursuer to a third party, the assignee may be sisted as a pursuer.[2] The title of representatives to sist themselves depends on the transmission to them of the right in respect to which the action is maintained. Thus the title to sue an action of damages for personal injury transmits to the executors of a deceased person, who may therefore crave to be sisted after his death in an action begun by the deceased person.[3] An assignee of property arrested was allowed to sist himself, and to insist as pursuer, in an action of reduction of the arrestment.[4] Where the pursuer assigns his interest in the course of the action, the assignee has in general a right to sist himself and to carry on the action for his interest. Thus the trustee of a bankrupt, in virtue of the legal assignation in his favour, may sist himself as a party to all actions which the bankrupt has initiated in his own name. And on this principle, when a woman who is pursuer of an action marries *pendente processu*, her husband may sist himself as a party to the action. Even an alleged husband may apparently sist himself, though both he and his wife deny the marriage, if it be asserted by the opposite party.[5] If the assignation be special, and not such as is involved in such cases as marriage and bankruptcy, the assignee

[1] Mackenzie's Tr. *v.* Mackenzie, 1908, S.C. 995; Calderhead's Trs. *v.* Fyfe, 1832, 10 S. 582; Grieve, 9 M. 582.

[2] Mavor *v.* Aberdeen Educ. Trust, 1902, 10 S.L.T. 93 (O.H.).

[3] Neilson *v.* Rodger, 1853, 16 D. 325; M'Culloch *v.* Hannay, 1829, 8 S. 122.

[4] Watt *v.* Scot. N.E. Rly. Co., 1866, 4 M. 318.

[5] Lynch *v.* Stewart, 1870, 9 M. 860.

may be compelled to sist himself, otherwise the cedent may be required to find caution for expenses.[1] A trustee assumed *pendente processu* has a right to have himself sisted as a party to an action at the instance of his co-trustees.[2] Persons whose concurrence is necessary to make the instance complete may be allowed to sist themselves as pursuers. Thus, in an action of interdict at the instance of a tenant to prevent interference by possession, the landlord was allowed to sist himself as pursuer.[3]

*Defenders.*—As a general rule, a party, though not called, may sist himself to any action which he has a clear interest to defend.[4] Thus a representative of a deceased defender, a trustee, or a transferee all possess such a right, and a landlord may sist himself to an action against his tenant which he has an interest to defend.[5] A third party claiming a right of property in the subject of litigation may similarly sist himself as a defender,[6] though in one case the Court refused to sist such a party claiming a patent as the defender in an action not directed against him, the subject of which was the infringement of another patent by parties who declined to defend.[7]

*Party sisting must have Interest.*—A party who claims the right to sist himself either as pursuer or defender of an action must have a substantial interest in the subject of the litigation. Thus the right is confined to those who are representatives of a party, and a person who possesses an independent right to sue cannot be sisted as the pursuer of an action initiated by some one else.[8] Nor can a person who merely alleges a title, but who has neither produced nor established one. Thus trustees under a trust deed which had been destroyed, and of which they raised an action of proving of the tenor, were held to have no right to sist themselves as defenders before decree of proving of the tenor was pronounced.[9] And where the nominal pursuer disclaims or fails to adopt an action which he did not originally authorise, it is not competent for the

[1] *See supra.*

[2] Morison *v.* Gowans, 1873, 1 R. 116, *see per* L. Deas.

[3] Young *v.* Cunningham, 1830, 8 S. 959.

[4] M'Culloch *v.* Hannay, 1829, 8 S. 122; Buntine *v.* Dunlop, 1823, 2 S. 106; Ritchie *v.* Ritchie's Trs., 1874, 1 R. 826.

[5] Mags. of Douglas *v.* E. of Dalhousie, 15th Nov. 1811, F.C.

[6] L. Blantyre *v.* L. Adv., 1876, 3 S.L.R. 213.

[7] Laing's Sewing Mach. Co. *v.* Norrie & Sons, 1877, 5 R. 29.

[8] Dobbie *v.* Cunningham, 1843, 5 D. 1385.

[9] Geikie *v.* Hutchinson, 1848, 10 D. 354.

true *dominus litus* to sist himself and carry on the action alone.[1] In one case the assignee of the representative of a deceased pursuer was allowed to sist himself as pursuer by a minute lodged in process, although the representative had not made up a title to his ancestor's process.[2] But even where a party has sufficient interest to defend an action, he may, by his conduct, bar himself from the right to sist himself as a defender.[3]

**At what Stage addition of Parties competent.**—New parties may be added on the motion of either party at any stage in the cause. The proper time for adding a new party who ought originally to have been included in the instance or as a defender is prior to the closing of the record, but it is competent at any stage, and if the motion be made subsequent to the closing of the record, the record will be opened up to permit of the amendment. A party who applies to be sisted either as a pursuer or as a defender may competently be sisted at any stage of the cause prior to the final determination of the process by extract, even if there be a final decree dismissing the action which is not extracted.[4] The representatives of a party who has died after obtaining decree in his favour have the right to apply to be sisted in his place, and to get extract of the decree in their names.[5] The executors of the law agent of the successful party are entitled to sist themselves in his place, and to move for and obtain extract of the decree for expenses in their own names.[6]

**Mode of adding Parties.**—A new pursuer may be added on the motion of either party by intimation to him that he may sist himself as a party to the action if so advised. A new defender may be added on the motion of the pursuer as an amendment of the initial writ. Where a party desires to be sisted at his own instance, a minute to that effect is lodged in process, on which an order is pronounced sisting him in room of the original party if such party be divested of his interest in the cause, or sisting him for his interest in the premises if the original party be not divested. Where a new party is added, whether by being called as a party to the action or

[1] Ferguson, Davidson & Co. *v.* Paterson, Dobbie & Co., 1898, 1 F. 227.

[2] Fearn *v.* Cowper, 1899, 7 S.L.T. 99 (O.H.).

[3] *See* Chanter & Co. *v.* Thomas, 1845, 7 D. 465.

[4] Mags. of Douglas *v.* E. of Dalhousie, 15th Nov. 1811, F.C.

[5] Morrison *v.* Hunter & Ross, 1822, 2 S. 62.

[6] Anderson *v.* Clark, 1834, 12 S. 526; Baillie *v.* Baxter & Mitchell, 1872, 10 M. 414.

by being sisted on his own motion, before the record is closed, the titles of the pleadings are altered so as to include all the parties, and subsequent pleadings appear in the name of all. Where a defender has by his acts, as by receiving payment of the expenses awarded, consented to the sisting of a new pursuer, he cannot afterwards object.[1] A new party may be added, or intimation made to a party that he may sist himself if so advised, by the Sheriff *ex proprio motu*. Thus a *curator ad litem* may be added by the Sheriff by interlocutor appointing him. A formal sist may in certain circumstances be dispensed with. Thus a person who appears and takes part in a process in room of another, and who finally obtains a decision, will be barred from objecting subsequently that he was never properly made a party to the process.[2] And in one case the opinion was expressed that the fact that a party appeared and moved for a proof to be taken to lie *in retentis* was sufficient to bar him from objecting that he had not been sisted as a party.[3] All objections against the sist of a party must be stated at the time the sist is moved for, and they must be either disposed of or expressly reserved, otherwise the Court will not afterwards entertain them.[4]

**Rights and Liabilities of added Parties.**—A party who has been added or sisted may maintain all pleas competent to him in his own right[5] or in right of the person in whose place he has been sisted, and he is liable to all objections which his opponent may competently state against him or which might have been stated by or against his predecessor.[5] A party cannot be added or sisted conditionally, and he is therefore liable for expenses as a party in the cause. Where a party sists himself in room of another, he is liable not only for the expenses subsequent to the sist, but for those occasioned by his predecessor, and it is incompetent for a party to sist himself on condition that no liability for previously incurred expenses will attach to him.[6] A trustee in bankruptcy who sists himself merely for purposes of enquiry does not render himself liable for expenses previously incurred.[7]

[1] Wood *v.* M'Caul, 1833, 12 S. 50.

[2] Gill *v.* Anderson, 1859, 21 D. 723.

[3] Cameron *v.* Gordon, 1830, 8 S. 538.

[4] Campbell *v.* Campbell, 1865, 3 M. 360.

[5] Watt *v.* Scot. N.E. Ry. Co., 1866, 4 M. 318.

[6] *See* Wallace *v.* Eglinton, 1836, 14 S. 599; Torbet *v.* Borthwick, 1849, 11 D. 694; Ellis *v.* Ellis, 1870, 8 M. 805.

[7] Muir *v.* Tay Marine Ins. Co., 1843, 5 D. 579.

# CHAPTER XVI

## PROCEEDINGS TO OBTAIN SECURITY FOR SUM SUED FOR, OR FOR EXPENSES

### I. SECURITY FOR SUM SUED FOR

#### 1. Arrestment on the Dependence


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### 1. Arrestment on the Dependence

**Warrant to Arrest.**—If craved for in the initial writ, the warrant of service may include a warrant to arrest on the dependence, by virtue of which the pursuer may arrest in security debts or other personal property belonging to the defender in the hands of third parties. If not craved for in the initial writ, a separate precept of arrestment, narrating the ground of application,[1] may be issued at any time by the Sheriff-Clerk upon production to him of a writ containing pecuniary conclusions upon which a warrant of citation has been granted, or a liquid document of debt.[2] The arrestment may be competently effected upon the certified copy of the initial writ, which may, after lodgment, be borrowed for the purpose by the agent of any party to the process.[3] The object of obtaining a warrant

[1] *See* A.S., 1839, S. 153.
[2] Act, Rule 45.
[3] *Ibid.*

to arrest on the dependence of the action is to prevent the defender parting with or alienating funds or moveable property belonging to him in the hands of third parties, and thus to enable the pursuer to obtain, either in whole or in part, payment of the debt sued for out of the funds arrested, in the event of his proving successful in the action. Arrestment on the dependence is competent only in actions which contain pecuniary conclusions, and such conclusions must be for payment of something other than expenses. Thus it cannot be competently used to obtain security for expenses, and it cannot be inserted in an action of declarator in which the only pecuniary conclusion is one for expenses,[1] nor in an action of reduction.[2] It is, however, competent in a consistorial action, provided it contain pecuniary conclusions,[3] even when the conclusion is for future aliment.[4] It is, however, incompetent in respect of future debts not yet due; and in actions concluding for future aliment, as in actions of separation and aliment, it is competent only if the debtor is *vergens ad inopiam, in meditatione fugae*, or about to alienate his funds, facts which the pursuer must be in a position to prove.[5] As the warrant is obtained by the pursuer for his security, he uses it at his own cost, and a decree for expenses does not cover the expense of an arrestment on the dependence.[6] As it is also obtained *periculo petentis*, a pursuer who uses an arrestment wrongly may subject himself to an action of damages, even although it is not proved that the arrestment was used maliciously and without probable cause.[7] When followed up without undue delay, an arrestment on the dependence, like that in execution, confers a preferential right in favour of the creditor using it.[8]

**Time for Arrestment.**—The arrestment may be used either before or after service of the initial writ upon the defender. If the warrant be served before the initial writ, the latter must be served upon the defender within seven days of the execution of the arrestment, and the action must be tabled within fourteen days after

[1] Ketchen *v.* Grant, 1871, 9 M. 966.

[2] Stafford *v.* M'Laurin, 1875, 3 R. 148.

[3] Thomson *v.* Sharp, 1828, 7 S. 1; Symington *v.* Symington, 1875, 3 R. 205.

[4] Burn *v.* Burn, 1879, 7 R. 355.

[5] *See* Symington *v.* Symington, Burn *v.* Burn, and Thomson *v.* Sharp, *sup.*

[6] Symington *v.* Symington, 1874, 1 R. 1007; Black *v.* Jehanger Framgee & Co., 1887, 14 R. 678; Roy *v.* Turner, 1891, 18 R. 717.

[7] Meikle *v.* Sneddon, 1862, 24 D. 720; Wilson *v.* Mackie, 1855, 3 R. 18.

[8] Mitchell *v.* Scott, 1881, 8 R. 875.

service, otherwise the arrestment falls.[1] Where the expiry of this period falls within vacation, the writ must be tabled on the first Court day thereafter.[2] After service of the initial writ, the arrestment remains available during the dependence of the action. An arrestment on a separate precept, which is generally used when a writ with no such warrant has been served, may be used before service, but in that case the provisions as to service and tabling the writ apply as in the case of a warrant obtained on the writ itself.

**Mode of Service.**—Arrestment is a form of diligence which must still be executed by an officer of Court, and neither the Act of 1907 nor the Citation Amendment Act of 1882 appear to contemplate that the mode of postal citation introduced by the latter Act should apply.[3] The warrant or precept must therefore be served by an officer in the presence of a witness, as in the case of service of the writ. If the schedule of arrestment is not personally served on the arrestee, a copy of the schedule must also be sent by postal registered letter to the last known place of abode of the arrestee, or (if such place of abode is unknown, or if the arrestee is a firm or corporation) to the arrestee's place of business if known, or if not known then to any known place of business, and the officer in his excution of service must certify that this has been done, and specify the address.[4] The service may now be lawfully executed within the jurisdiction of any Sheriff, without indorsation by the Sheriff-Clerk of that jurisdiction, by an officer either of the Court granting the warrant or precept or of that within which it is executed.[5]

*On whom served.*—The warrant may be served on any one who is indebted to the defender, or who holds property of the defender in his possession, according to the same rules as obtain in the case of arrestments in execution.[6] But the arrestment must be in the hands of the arrestee. And therefore an arrestment in the hands of an agent of a branch of a bank, instead of in the hands of the bank itself, is inept unless the agent is personally responsible for repayment of the fund arrested.[7] The arrestee must be indebted directly

[1] Act, Rule 127; A. S. 1839, s. 154.

[2] The Debtors' Act, 1838, s. 17. The Act, with the exception of s. 19, is still in force.

[3] *See* Cit. Amend. Act, 1882, s. 3.

[4] Act, Rule 126; Act, 1876, s. 12 (5). The provision that the letter must be *registered* is new, as are also those with reference to firms and corporations.

[5] Act, Rule 10.

[6] *See infra.*

[7] Graham *v.* Macfarlane, 1869, 7 M. 640; Ritchie *v.* Maclachlan, 1870, 8 M. 815.

to the defender and not to some third party. It is therefore incompetent to arrest in the hands of an individual partner a debt due by the company.[1] But so long as the arrestee is a person against whom the defender might, at the time when the arrestment is used, competently institute an action for payment of his debt, it is immaterial that he is not the person who originally contracted the debt. Thus arrestment of a debt due to the defender may competently be used in the hands of a factor and commissioner, an executor, or a trustee of the person who originally incurred the debt. Thus an arrestment used in the hands of shipbrokers who had the entire management of a shipping company was held valid on the ground that they were not agents of the company, but factors and commissioners.[2] Care must be exercised to see that the arrestments are used in the proper hands. Thus in the case of a corporation which sues or is sued in its corporate name, the arrestment must be used in the hands of the corporation itself, delivered at its business address to a servant or other official authorised to receive documents addressed to it,[3] and not in the hands of the clerk or secretary.[4] A person who has sold goods for which the price has not been paid, may attach them by arrestment while in his own hands or possession, and such arrestment has the same operation and effect in a competition with a subsequent purchaser from the original purchaser or otherwise as an arrestment by a third party.[5]

**Subject of Arrestment.**—The same subjects as may be arrested in execution may in general be arrested in security. The wages of labourers, farm servants, manufacturers, artificers, and workpeople generally, except the surplus over twenty shillings a week,[6] are exempt from arrestment in security, though an arrestment in execution of such wages is competent on a decree granted in respect of an alimentary allowance or payment, or for rates and taxes imposed by law, the arrestment setting forth the nature of the debt for which it is used.[7]

[1] Burns *v.* Gillies, 1906, 8. F. 460; Hay *v.* Dufourcet, 1880, 7 R. 972; *but see* The Partnership Act, 1890, s. 16.

[2] Carron Co. *v.* Currie & Co., 1896, 33 S.L.R. 578.

[3] Glasgow Corporation *v.* Watson, 1898, 25 R. 690.

[4] Gall *v.* Stirling Water Comrs., 1901, 9 S.L.T. 107 (O.H).

[5] Sale of Goods Act, 1893, s. 40; Merc. Law Amend. Act, 1856, s. 3.

[6] *See* Matthew *v.* M'Leish, Guthrie's Sel. Sh. Ct. Ca. 1, 371.

[7] Wages Arrest. Limitation Act, 1870.

**Report of Execution.**—The party using an arrestment on the dependence or his agent must forthwith report the execution of it to the Sheriff-Clerk,[1] the object of the provision being to enable the defender to apply for rectification of any error in its use.

**Loosing, Restricting, or Recalling Arrestments.**—The defender against whom it is used may apply to the Sheriff to have the arrestment loosed, or to have it restricted or recalled. The application is competent only at the instance of the defender, and if the arrestee dispute the validity of the arrestment he must await and defend the action of furthcoming,[2] though in the event of such a course proving inconvenient he might probably competently try the question in an action of multiplepoinding.[3] The application must be made to the Sheriff from whose books the warrant has issued, and must be duly intimated to the creditor or pursuer, who may lodge answers to the petition if so advised.[4] The Sheriff proceeds to dispose of the matter summarily, and his judgment is subject to review by the Court of Session.[4] On a petition for the recall of arrestments used on the dependence of an action in the Sheriff-Court, the Sheriff pronounced an interlocutor which bore that "having heard parties" he recalled the arrestments on caution, while as a matter of fact no answers to the petition for recall had been lodged. The respondents in the petition appealed, and the Court repelled an objection to the competency of the appeal that as no answers had been lodged the statutory procedure had not been followed, holding that there had been no departure *extra cursum curia* such as would constitute the Sheriff an arbiter and bar the respondent from taking an appeal.[5] Arrestments may be loosed on general caution being found for the whole debt due, including principal, interest, and expenses, being forthcoming in the event of decree being granted in favour of the pursuer, or a particular subject or fund arrested may be loosed on special caution being found that it or its value will be made forthcoming in the same event. Where anything less than full caution, either general or special, is found, the matter must be carried through by motion to the Sheriff, otherwise it may be carried through by the Sheriff-Clerk. Where the Sheriff thinks right,

[1] Act, Rule 127.

[2] Vincent *v.* Chalmers' Tr., 1877, 5 R. 43.

[3] Dove Wilson, 4th ed. p. 213.

[4] Debtors' Act, 1838, s. 21.

[5] Gordon *v.* Bruce & Co., 1897, 24 R. 844.

consignation may be accepted in place of caution.[1] Arrestments may be restricted on petition where the conclusions of the initial writ are for random sums, or where the subjects arrested are of a greater value than the decree which the pursuer is likely to obtain. They may also be recalled on petition where they have been used miniously or oppressively, or without sufficient legal warrant.

Questions as to whether the debtor's funds have or have not been attached by the arrestment cannot be competently tried in a petition for recall.[2]

**Breach of Arrestment.**—An arrestee who, except in good faith or in ignorance of the arrestment,[3] makes payment to the defender of the sum arrested or allows articles attached by the arrestment to leave his possession, renders himself liable to a separate action of damages,[4] and to second payment of the sum arrested. A breach of the arrestment is not, however, necessarily a contempt of Court.[5] In one case, where the master of a ship arrested on the dependence broke the arrestment and sailed away, the defender was ordered to find caution within a fortnight, under reservation of his right to apply for recall of the arrestment.[6]

**Prescription.**—Arrestments on the dependence prescribe in three years from the date of obtaining decree in the depending action, or if used upon a future or contingent debt, in three years from the time when the debt becomes due or the contingency is purified.[7]

**Effect of Arrestment.**—Unlike arrestments *ad fundandam jurisdictionem*, which create no *nexus* of the subjects arrested, arrestments on the dependence of an action do not require to be repeated to be effective in execution. Thus, in one case, a pursuer used arrestments *ad fundandam jurisdictionem*, and subsequently arrested the same subjects on the dependence. Subsequent to the date of the arrestment to found jurisdiction, but prior to that used on the dependence, the pursuer of another action arrested the subjects on the dependence of his action, and it

[1] James *v.* James, 1886, 13 R. 1153; Ellis *v.* Menzies & Co., 1901, 9 S.L.T. 204 (O.H.).

[2] Vincent *v.* Chalmers' Tr., 1877, 5 R. 43.

[3] Laidlaw *v.* Smith, 1841, 2 Rob. Ap. 490.

[4] Ersk. iii. 6. 14.

[5] Inglis *v.* Smith, 1867, 5 M. 320.

[6] Meron *v.* Umland, 1896, 3 S.L.T. 444 (O.H.).

[7] 1669, c. 9; Debtors' Act, 1838, s. 22.

was held that as the arrestment to found jurisdiction had created no *nexus* of the subjects, the arrestment on the dependence used by the pursuer in the second action had obtained priority over that used by the pursuer of the first action, being prior to it in point of time.[1] Where the subjects arrested are in the hands of a custodier or storekeeper, the arrestment will attach them, unless prior to the laying on of the arrestment a valid assignation of the subjects has been effected by the owner, and intimation of the assignation has been duly made to the storekeeper.[2] Funds in the hands of a bank which have been specially appropriated or ear-marked towards payment of a particular debt cannot be arrested in security of the original depositor's debts.[3] Where arrestments are used on the dependence of an action which, as laid, turns out to be incompetent or irrelevant, but which is so amended as to become competent or relevant, the amendment has not the effect of validating the arrestment so as to prejudice the rights of the defender's creditors interested in defeating the diligence, though it operates to obviate objections stated by the defender himself or by any one representing him in title, or in right of a debt contracted subsequent to the execution of the arrestment.[4] Questions as to the validity of an arrestment fall to be determined by the *lex rei sitæ*.[5] The arrestment attaches in the hands of the arrestee only funds or property actually due or belonging at the time to the defender, and does not operate so as to attach funds, goods, rents, or interest coming into the arrestee's hands subsequent to the execution of the arrestment. On this principle only arrears of rent and interest, or that due for the current term, are covered by an arrestment. Similarly, goods consigned to the arrestee but not actually in his possession at the date of using the arrestment are not attached thereby. The subject is more fully treated of later when dealing with arrestments in execution.

[1] Stillie's Trs. *v.* Stillie, 1898, 6 S.L.T. 222 (O.H.).

[2] Inglis *v.* Robertson & Baxter, 1898, 25 R. (H.L.) 70.

[3] Brit. Linen Co. *v.* Kansas Invest. Co., 1895, 3 S.L.T. 208, 320 (O.H.).

[4] Act, Rules 26, 80; Fischer *v.* Andersen, 1896, 23 R. 395; *see infra* Amendment of Pleadings.

[5] Inglis *v.* Robertson & Baxter, *sup.* Roy. Bank of Scot. *v.* Secs. Invest. Co., 1897, 4 S.L.T. 332 (O.H.).

### 2. Consignation and Caution

The defender may, in the discretion of the Court, be ordained to consign the whole or a part of the amount sued for, if he admit the fact that the debt is due but challenges the right of the pursuer to sue for it,[1] in which case consignation may be ordered to await the decision of that question, or if he admit the debt subject to certain deductions which are disputed and require to be established.[2] But while consignation is a matter within the discretion of the Court, it will not in any event be ordered unless the circumstances are such as to make it clear that a balance will ultimately be due by the defender,[3] nor if the Court be satisfied that the defender has been prevented by arrestment or other legal obstacle from complying with the order.[4] In certain circumstances it is the duty, or at least to the interest, of the defender to make consignation without being ordained to do so. Thus, where he makes a tender, the amount tendered, or where in answer to a claim for payment of an account he pleads overcharge, the amount which in his opinion would form a reasonable charge should in each case be consigned, since in considering the question of expenses the fact that defender has made consignation will materially strengthen his position. But in making consignation the defender must bear in mind that the pursuer becomes entitled to decree for the consigned amount.

Consignation or caution for the sums sued for may be ordered when the pursuer founds upon a liquid document of debt, and the defender pleads that the document is void or voidable *ope exceptionis.* When a deed or writing is founded on by any party in the cause, all objections to it may be stated and maintained by way of exception, without the necessity of bringing an action of reduction.[5] The Court is bound to give immediate effect to an objection by the defender that a document founded on by the pursuer is null or void *ipso jure*, as, for example, where it is destitute of the statutory solemnities of execution, or is [unstamped in cases in which afterstamping is not competent, or is granted in violation of the pro-

[1] Rolfe *v.* Drummond, 1862, 1 M. 39.
[2] Cumming *v.* Williamson, 1842, 4 D. 1304.
[3] Findlay, Bannatyne & Co. *v.* Donaldson, 1846, 5 Bell's Ap. Ca. 105.
[4] Cowan *v.* Western Bank, 1860, 22 D. 1260.
[5] Act, Rule 50.

visions of the Bankruptcy Acts. In such cases, therefore, no action of reduction of the document is necessary. But where the nullity is such that the document is void or voidable only *ope exceptionis*, it can only be set aside by an action of reduction in the Court of Session. Thus a document which has been forged, extorted by force and fear, induced by fraud or the circumvention of a facile person, or given under essential error, is not void but voidable, and the nullity therefore requires to be established in an action of reduction. In such cases where the defender takes objection to the document *ope exceptionis*, and where therefore an action of reduction is competent, he may be ordered to consign the amount in dispute, or to find caution as the Sheriff may direct.[1] The provision of section 100 of the Bills of Exchange Act, 1882, that in any judicial proceeding in Scotland any fact relating to a bill, cheque, or promissory note which is relevant to a question of liability thereon may be proved by parole evidence, does not in any way affect the existing law and practice whereby the party who is, according to the tenor of the document, debtor to the holder in its amount, may be required, as a condition of obtaining a sist of diligence or a suspension of a charge or threatened charge, to make consignation or to find caution as the Court may direct. In the case, therefore, of a bill, cheque, or promissory note, a pursuer who desires to make a defender find security should proceed at the proper time by way of summary diligence. The defender will then be forced to suspend, and as a condition of obtaining a sist of the diligence threatened against him may be ordered to consign the amount of the document or to find caution.

**Effect of Consignation.**—Money consigned by order of the Court is subject solely to the order of the Court as to its disposal, and it cannot therefore be arrested or attached by legal diligence so as to defeat such order as to its disposal, though the interest of any particular litigant in the sum consigned may be arrested by his creditors in the same way as his interest in any other fund.[2] But a person seeking to attach the fund by arrestment may be barred *personali exceptione*, as where he himself is the person who asks for consignation and it is made under an arrangement which he subsequently breaks.[3]

[1] Act, Rule 51 ; Act 1877, s. 11.

[2] Pollock *v.* Scott, 1844, 6 D. 1297.

[3] Campbell *v.* Lothians, 1858, 21 D. 63.

**Custody of Consigned Money.**—All consignations must be entered by the Sheriff-Clerk in a book kept by him for the purpose, in which full particulars of each consignation must be specified, any person interested being entitled, free of charge, to inspect such book at any time. All consignations amounting to £5 and upwards must, within ten days, be lodged on deposit receipt in a bank approved by the Sheriff, the receipt being taken in the Sheriff-Clerk's name and bearing on its face the name of the party or parties on whose behalf consignation is made, and of the cause or proceeding to which it relates. The Sheriff-Clerk is responsible for the safe custody of all consignations made with him, whether lodged on deposit receipt or not, and is bound to account for them, with interest (if any has accrued) to the person having right to them, subject to the orders of the Sheriff, though he is not responsible for any loss resulting from the failure of the bank in which they are lodged. He must also keep the consigned money distinct from any other funds in his possession. He is bound on the 1st April of each year to lodge a return of the consignations made with him and which are unclaimed at the date of making the return, for the year up to 31st December which terminated seven years previously, with the King's and Lord Treasurer's Remembrancer. All unclaimed consignations must be paid over to that official, though any person who can prove a legal claim to the whole or any part of a sum so paid may recover it by an order of Court in the same way as if it had remained in the custody of the Sheriff-Clerk.[1]

[1] Sheriff Courts Consignations Act, 1893.

# CHAPTER XVII

## PROCEDURE TO OBTAIN SECURITY FOR SUM SUED FOR, OR FOR EXPENSES—*continued*

### II. CAUTION OR SECURITY FOR EXPENSES

#### 1. Sisting Mandatary


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#### 3. Effect of Failure to Consign, Sist Mandatary, or Find Caution

### 1. Sisting Mandatary

**When Mandatary necessary.**—A litigant who is resident furth of Scotland is, as a general rule, required to sist a mandatary, who becomes on appointment responsible to the Court for the conduct of the cause, and to the opposite party for any expenses for which the mandant may be found liable. The opposite party may at any stage move for an order to compel his opponent to sist a mandatary, but it is in the discretion of the Court whether the order should be granted.[1] The rule applies equally to defenders as to pursuers,[2] but while in general a pursuer who is resident furth of

[1] D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655, *per* Ld. Pres. Inglis.

[2] Tingman *v.* Tingman, 1854, 17 D. 122.

Scotland will be required to sist a mandatary unless he can allege sufficient reason to the contrary, the Court will exercise a somewhat wider discretion in the case of a defender.[1] If the party be *de facto* resident outwith Scotland, it is immaterial whether his non-residence be due to the fact that he is a foreigner or that he is a Scotsman resident abroad, or that, being a Scotsman, he has left Scotland during the dependence of the action.[2] Thus a defender who, after an action had been raised while he was a domiciled Scotsman, pleaded no jurisdiction on the ground that he had gone to America *animo remanendi*, was ordained to sist a mandatary.[3] So essential has the presence of a mandatary within Scotland been deemed, that it has been held that a foreigner could not even be allowed to appear to maintain a plea of no jurisdiction,[4] or to present a petition to have the judgment of the House of Lords, finding that the Court of Session had no jurisdiction, applied,[5] without first sisting a mandatary. The tendency of the Court in regard to the sisting of a mandatary by the defender is towards greater relaxation of the rule, and in more recent decisions defenders outwith the jurisdiction of the Scots Courts have been permitted to plead objections to the competency of the action and pleas of no jurisdiction without being required to sist mandataries.[6]

*Exceptions to Rule.*—The exceptions to the rule that a pursuer resident outwith Scotland must sist a mandatary are comparatively few. The most important is that which applies to litigants resident in England or Ireland, who in general are not required to sist mandataries, since under the provisions of the Inferior Courts Judgments Extension Act of 1882, which extended the principles of the Judgments Extension Act of 1868 to Sheriff Courts, a judgment obtained against such a person in the Sheriff Court can now be enforced against him in England or Ireland respectively.[7] The phraseology of section 10 of that Act has occasioned some difficulty in respect that it provides that the whole cause of action must have arisen, or the obligation to which the judgment relates ought to have

[1] Simla Bank *v.* Home, 1870, 8 M. 781.

[2] Shedden *v.* Patrick, 1883, 15 D. 379 ; Smith *v.* Countess of Strathmore, 1828, 6 S. 903.

[3] Young *v.* Carter, 1907, 14 S.L.T. 411.

[4] Rankin *v.* Nolan, 1842, 4 D. 832.

[5] Grant *v.* Pedie, 1825, 4 S. 241.

[6] Clark *v.* Campbell, 1873, 1 R. 281, *diss.* Ld. Deas ; D'Ernesti *v.* D'Ernesti, *sup.*

[7] Lawson's Trs. *v.* British Linen Bank, 1874, 1 R. 1065.

been fulfilled, within the district of the Sheriff Court, and that the defender must have been served personally. From these provisions it might appear that where the defenders of an action are a limited company which by its nature is incapable of personal citation, the provisions of the Act do not apply. Such a construction of the section would appear, however, to be contrary to the intentions of the Legislature.[1] A party resident in England and pursuing an action in Scotland will not be called upon to sist a mandatary so long as he remains in the United Kingdom, but if his circumstances are such that a Scots pursuer similarly placed would be called upon to find caution for expenses, he may be compelled to sist a mandatary.[2] A foreign pursuer who is only temporarily resident in England may be required to sist a mandatary.[2] But a foreign pursuer who during the dependence of an action comes to Scotland *animo remanendi* escapes the necessity of having to appoint a mandatary,[3] though in certain circumstances an offer by a pursuer that he will reside in this country may not be sufficient.[4] He must, however, come with the intention of taking up permanent residence, and a mere offer to find caution that he will personally attend all diets in the cause or an offer to consign the sum sued for are not sufficient to enable him to dispense with a mandatary.[5] As a corollary to the rule that a person resident in England will not be required to sist a mandatary, it has been held that a foreign litigant may sist as a mandatary a person who is subject only to the jurisdiction of the English Courts.[6] Mere impecuniosity is no reason for requiring a party to sist a mandatary,[7] and therefore foreigners are not exempted on the ground of bankruptcy,[8] though in special circumstances they may be exempted. As a rule a foreign claimant in an action of multiplepoinding will not be required to sist a mandatary.[9] In the case of

[1] *See* Hudson *v.* Innes & Grieve Ld., 1908, 24 Sh. Ct. Reps. 190.

[2] Dessau *v.* Daish, 1897, 24 R. 976.

[3] Faulks *v.* Whitehead, 1854, 16 D. 718.

[4] Dickey *v.* Brit. Mexican Rly. Co., 1893, 1 S.L.T. 273 (O.H.).

[5] Railton *v.* Matthews, 1844, 6 D. 1348; Brown *v.* Lindley, 1833, 12 S. 18.

[6] Blow *v.* Equadorian Assoc. Ld., 1903, 5 F. 444.

[7] Dessau *v.* Daish, *sup. per* Ld. Kinnear.

[8] Overbury *v.* Peek, 1863, 1 M. 1058.

[9] Clark *v.* Campbell, 1873, 1 R. 281; N. B. Rly. Co. *v.* White, 1881, 9 R. 97; Town & County Bank *v.* Lilienfield, 1900, 8 S.L.T. 227 (O.H.); Stow's Trs. *v.* Silvester, 1900, 8 S.L.T. 253 (O.H.); *but see* Gordon's Trs. *v.* Forbes, 1904, 6 F. 455; Elmslie *v.* Pauline, 1905, 7 F. 541.

British subjects ordinarily resident within the kingdom, but actually resident outwith the jurisdiction at the date of raising or during the dependence of the action, the rule appears to be that if their absence from the country is likely to be of a short or temporary character, or is due to business or professional necessity, a mandatary will not be required. Thus a soldier who, after raising an action for legitim, was sent abroad on service was absolved from sisting a mandatary.[1] And where during a litigation a defender left Scotland for good, his reasons for so doing being wholly unconnected with the cause of the action, the Court refused a motion to have him ordained to sist a mandatary.[2] But in special circumstances, even where the absence is merely temporary, the Court may order a mandatary to be sisted.[3] Where a party has occasion to be frequently absent from the country, and he is ordered to sist a mandatary, such mandatary does not require to be re-sisted on each occasion of absence.[4] A proprietor of heritage in Scotland is in most cases excused from sisting a mandatary, provided that the heritable estate is of sufficient value to afford adequate security for the expenses in the cause, and that it is not the subject of litigation, as for instance where the title is under reduction.[5] But a person drawing an annuity from heritable property must in general sist a mandatary in the ordinary way.[6] The principle has, however, been extended to include the case of persons who are owners of moveable property under the control of the Court,[7] to a claimant in a multiplepoinding who had been preferred to a fund sufficient to cover expenses, and to the pursuer in a Sheriff Court action who, on appeal, held a judgment for £87.[8] A mandatary is not necessary where one of several parties suing or defending an action on a joint title is absent from the country, if nothing can be alleged against the solvency of those remaining. Thus, where one of a quorum of trustees, or a partner of a company suing for a company debt, is absent, no mandatary is necessary, provided there be a solvent trustee or partner respectively resident

[1] Graham *v.* Graham's Trs., 1901, 4 F. 1 ; *but see* Lowson *v.* Lowson, 1902, 4 F. 692.

[2] Morton *v.* Smith, 1902, 9 S.L.T. 336 (O.H.).

[3] M'Donald's Trs. *v.* Stewart, 1891, 18 R. 491.

[4] Scott *v.* Gillespie, 1823, 2 S. 165.

[5] Sandilands *v.* Sandilands, 1848, 10 D. 1093 ; Cal. & Dumbartonshire Rly. *v.* Turner, 1849, 12 D. 406 ; Fairley *v.* Elliot, 1839, 1 D. 399.

[6] Smith *v.* Countess of Strathmore, 1828, 6 S. 903.

[7] Buik *v.* Patullo, 1855, 17 D. 568.

[8] Boulton & Co. *v.* Aitkenhead, 1892, 29 S.L.R. 659.

in Scotland.[1] Where, however, the several pursuers or defenders of an action are independent and are not jointly and severally liable for or entitled to expenses, a mandatary must be sisted in the ordinary way for any party outwith the United Kingdom.[2] The ordinary rules as to the necessity for sisting a mandatary do not apply to consistorial actions.[3]

*Rule applies to all Proceedings.*—Where a mandatary is necessary, the rule applies not merely to actions, but to all proceedings in Court.

*Equivalents inadmissible.*—Where a mandatary is necessary, the Court will not allow the absent party to dispense with a mandatary by the substitution of an equivalent. Thus consignation of the sums sued for will not dispense with the necessity for sisting a mandatary,[4] nor will the finding of caution *de judicio sisti.*[5] So the arrestment in this country of the funds of a foreigner will not absolve him from the necessity of sisting a mandatary.[6]

**At what Stage Mandatary necessary.**—A pursuer whose absence from Scotland makes a mandatary necessary should conjoin one with himself when raising the action, but as the instance is good so long as and until an objection that a mandatary is necessary is pleaded by the opposite party, he may and in practice frequently does delay doing so until a motion is made to compel him. A foreigner may competently sue an action in his own name, and if the defender offer no objection no mandatary is necessary. If, however, the opposite party waive his objection, either expressly or by implication, the absentee or foreigner cannot afterwards crave that the case be delayed to enable him to sist a mandatary. But a mandatary must be sisted in the case of a foreign pursuer before he can arrest on the dependence, since, as such diligence if wrongful or malicious may lead to an action of damages, there must be some one subject to the jurisdiction of the Scots Courts against whom such an action would be competent.[7] The motion to sist a mandatary should be made early in the cause, since, if it be too long delayed or made towards the end of the litigation under circum-

[1] Rob's Trs. *v.* Hutton, 1866, 4 M. 546; Antermony Coal Co. *v.* Wingate, 1866, 4 M. 544.

[2] Barstow *v.* Smith, 1851, 13 D. 854.

[3] Low *v.* Low, 1905, 12 S.L.T. 817 (O.H.).

[4] Brown *v.* Lindley 1833, 12 S. 18.

[5] Railton *v.* Mathews, 1844, 6 D. 1348, *per* L. Moncreiff.

[6] Rankin *v.* Nolan, 1842, 4 D. 832.

[7] Johnston *v.* Jendwine, 23 Jan. 1813, F.C.

stances which give rise to the suspicion that it is made *in mala fide*, or solely for the purpose of obtaining delay, it may be refused.[1] A party may, however, be barred *personali exceptioni* from his right to insist on the sisting of a mandatary. Thus, if he have imprisoned the opposite party for debt in a foreign country, he cannot make the absence which he himself enforces a ground for asking a mandatary.[2] A reasonable time will be granted by the Court to the agent in the cause to communicate with his client as to sisting a mandatary.[3]

**Form of Sisting Mandatary.**—Where the pursuer does not conjoin a mandatary with him in raising the action, a mandatary cannot be sisted without an order of Court. The mandatary may lodge a minute in his own name signed by him, and craving leave to be sisted, upon which an interlocutor sisting him is pronounced. When the opposite party moves that a mandatary be sisted, an order is pronounced by the Court ordaining the absent party to sist one. The absentee thereupon lodges a minute stating the name of the proposed mandatary, and the Court pronounces an interlocutor sisting him. But no particular form is necessary. As the opposite party may insist that a written mandate signed by the mandant in his favour be produced, such a mandate should be lodged along with the minute.[4] The mandate should be either holograph or probative, and it may be either general or special. A commissioner holding a mandate authorising him to sue and defend cannot grant a mandate in favour of another, though he may sist himself as mandatary.[5] But a person holding a power of attorney to raise the action may do so.[6] It is doubtful whether it is within the ordinary powers of an agent to sist a mandatary for a principal who unexpectedly goes abroad.[7] It is, however, in practice not uncommon, though if objection be taken the principal's ratification must be produced as early as practicable. The powers of a mandatary depend on the extent of his mandate,[8] and therefore a mandate to prosecute an action does not by implication confer power to abandon or compromise it.[9] These forms are not, however, absolutely necessary,

[1] Buik *v.* Patullo, 1855, 17 D. 568.
[2] Robertson *v.* De Salvi, 1857, 19 D. 996.
[3] Black *v.* Malcolm, 1830, 8 S. 599.
[4] Gunn *v.* Couper, 1871, 10 M. 116.
[5] Dempster *v.* Potts, 1836, 14 S. 521.
[6] Knight *v.* Freeto, 1863, 2 M. 386.
[7] Elder *v.* Young & Co., 1854, 16 D. 1003; Knight *v.* Freeto, *sup.*
[8] Gunn & Co. *v.* Couper, *sup.*; Thoms *v.* Bain, 1888, 15 R. 613.
[9] Thoms *v.* Bain, *sup.*

and where a law agent designed himself throughout the pleadings as mandatary for his client, and carried on the process in that character without objection from the opposite party, he was held to be barred from afterwards objecting, on being found liable for expenses, that he had never been competently sisted.[1]

**Sufficiency of Mandatary.**—A mandatary must not be bankrupt,[2] and he must not be notoriously insolvent,[3] though it is irrelevant to inquire whether he is possessed of funds to meet the expenses of the action, since a party to an action is not bound to find caution for expenses.[4] He must also be equal in social position to the person whom he represents.[5] Thus a farm servant was held not to be eligible as a mandatary for a nobleman's steward.[6] A mandatary must not be already a party to the process, and therefore a co-defender is not admissible as a mandatary for another co-defender.[7] But a bankrupt's trustee[8] or his near relation, as his mother,[9] may be his mandatary. Where an objection to the sufficiency of a proposed mandatary is stated, a remit to inquire into his circumstances is usually made to a competent person, and the Court acts on his report without formal proof.

**Liabilities and Rights of Mandatary.**—A mandatary is liable jointly and severally with his mandant for all expenses awarded against the latter, whether such expenses have been incurred prior[10] or subsequent[11] to his becoming mandatary, the liability attaching as soon as decree is pronounced. He does not, however, incur such liability if the mandant be on the Poor's Roll.[12] But a mandatary cannot be sisted conditionally, as for instance that he will not be liable for expenses.[13] It appears, however, to be open to doubt whether a mandatary sisted for a person who is bankrupt or notoriously insolvent at the time of sisting necessarily incurs liability for expenses.[14] A mandatary is liable for expenses only,

[1] Cullen *v.* Brown, 1860, 22 D. 1090.
[2] Turnbull *v.* Paul, 1829, 8 S. 124.
[3] *See* Harker *v.* Dickson, 1856, 18 D. 793.
[4] Railton *v.* Mathews, 1844, 7 D. 105; M'Kinlay *v.* M'Kinlay, 1849, 11 D. 1022.
[5] M'Kinlay *v.* M'Kinlay, *sup.*
[6] Stephenson *v.* Dunlop, 1841, 4 D. 248.
[7] Barstow *v.* Smith, 1851, 13 D. 854.
[8] M'Kinlay *v.* M'Kinlay, *sup.*
[9] *Ibid.*
[10] Renfrew *v.* Brown (Glasgow Mags.), 1861, 23 D. 1003.
[11] Lindsay *v.* Lindsay, 1827, 5 S. 310.
[12] Middlemas *v.* Brown, 1828, 6 S. 511.
[13] Pease *v.* Smith, 1822, 1 S. 420; Robertson *v.* Exley, 1833, 11 S. 320.
[14] *See* Overbury *v.* Peek, 1863, 1 M. 1058.

and cannot be made liable for any sum other than expenses awarded to the opposite party. The mandatary of a pursuer in an action of divorce is therefore not liable for interim aliment to the wife.[1] A mandatary is subject to the jurisdiction of the Court even when his mandant is not, and a mandatary may therefore be liable in expenses where a plea of no jurisdiction is sustained; where, however, such a plea is reserved he will not be held liable in expenses in the event of the plea being ultimately sustained.[2] Besides being liable for expenses, a mandatary is liable to implement any order the Court may pronounce in regulating the conduct of the process,[3] one great object in having a mandatary being that there shall be a party responsible to the Court for the proper conduct of the litigation. In short, the mandatary represents within the jurisdiction the party who is beyond it.[4] It does not appear, nevertheless, to have been decided that it is *pars judicis* to order a mandatary to be sisted.[5] The powers of a mandatary are strictly dependent on the extent of his mandate, and he has no rights independent of those of his principal. He cannot, therefore, like a law agent, carry on a process after his principal has withdrawn to the effect of obtaining a decision that expenses are not due,[6] and he is not entitled in the absence of express authority to compromise or settle an action.[7]

**Withdrawal of Mandatary.**—The withdrawal of a mandatary cannot be effected without the authority of the Court, and intimation to the opposite agent is insufficient.[8] A mandatary who has been sisted and who desires to withdraw should lodge a minute craving leave to withdraw, an order of Court being thereupon interponed to it.[8] A mandatary may withdraw at any time, but his liabilities are determined by the date at which he ceases to act, even for expenses which have accrued at that date but have not been decerned for till after his withdrawal,[9] unless he has been expressly exempted, as he may be on finding caution.[10] And he is liable for such expenses

[1] Webster *v.* Webster, 1896, 33 S.L.R. 369 (O.H.).

[2] Reoch or Maclachlan *v.* Robb, 1831, 9 S. 588.

[3] Renfrew *v.* Mags. of Glasgow, *sup. per* Ld. J.-C. Inglis.

[4] Overbury *v.* Peek, *sup. per* Ld. Deas.

[5] Chapman *v.* Balfour, 1875, 2 R. 291.

[6] Gordon *v.* Gordon, 1823, 2 S. 572.

[7] Thoms *v.* Bain, 1888, 15 R. 613.

[8] Martin *v.* Underwood, 1827, 5 S. 730.

[9] Erskine *v.* Walker's Trs., 1883, 10 R. 717.

[10] Ersk. iii. 3. 33, Ivory's note 140; Pease *v.* Smith, 1822, 1 S. 420.

as the opposite party may be put to as a consequence of his not withdrawing earlier, as when he withdraws on the day fixed for proof on jury trial.[1] The mandate falls on the death of the mandant, in which case the action is intimated to his representatives; if they fail to sist themselves, decree for the expenses may be taken against the mandatary.[2] The return of the mandant to Scotland does not relieve the mandatary, unless he lodges a minute of withdrawal.[3]

### 2. Caution for Expenses

**Discretion of Court.**—Whether a party to an action should or should not be ordained to find caution or security for the expenses that may be awarded against him is a matter entirely within the discretion of the Court, to be exercised in each particular case according to established principles.[4] The leading principle is that no pursuer is obliged to find caution for expenses on account of deficiency of funds, unless he has either been divested of his estate or is manifestly a mere catspaw.[5] It is only in exceptional circumstances that a defender will be ordered to find caution.[6] A party who is ordered to find caution may be allowed a reasonable time within which to do so. An interlocutor sisting process *ad interim* to enable a pursuer to find caution for expenses is appealable.[7]

**Bankrupt Pursuer.**—When a pursuer is divested of his property and the management of his affairs, either by sequestration, cessio, or the granting of a trust-deed, during the course of the litigation, intimation of the suit is made to his trustee, who then has the substantial interest, in order that he may, if so advised, sist himself as a party and carry on proceedings thenceforth in his own name. If the trustee declines to sist himself, the bankrupt may still carry on the suit, but he will in general be allowed to do so only on condition that he finds security for expenses.[8] In one case a

[1] Chapman *v.* Balfour, 1875, 2 R. 291.

[2] Marshall *v.* Connon, 1848, 21 Jur. 63.

[3] Erskine *v.* Walker's Trs., *sup.*

[4] Carne *v.* Manuel, 1851, 13 D. 1253.

[5] Porteous *v.* Pearl Life Ass. Co., 1901, 8 S.L.T. 340 (O.H. *per* Ld. Stormonth Darling).

[6] Drew *v.* Robertson, 1903, 11 S.L.T. 31 (O.H.).

[7] Horn & Co. Ltd. *v.* Tangyes Ltd., 1906, 8 F. 475.

[8] Horn *v.* Sanderson, 1872, 10 M. 295; Fraser *v.* Mackenzie, 1874, 12 S.L.R. 74; Gilmour *v.* Donnelly, 1899, 7 S.L.T. 267 (O.H.).

pursuer who had been ordered to find caution was allowed, on consigning a certain sum, to proceed without finding caution.[1] An interlocutor which ordains the pursuer "to find caution for expenses" means that he shall find caution for "future" expenses only.[2]

*Exceptions to Rule.*—An exception to the rule will in general be admitted where otherwise there would manifestly be a denial of justice. Thus, while the rule holds that generally an undischarged bankrupt who sues an action of damages for defamation or for injuries must find caution for expenses,[3] there may in such actions be circumstances which entitle the pursuer to be absolved from the necessity. There is, however, no absolute rule, and the matter is one which is always within the discretion of the Court.[4] Thus in an action of damages on account of injuries subsequent to a decree of cessio, the pursuer was held not bound at the commencement of the suit to find caution.[5] Similarly, in a case in which the pursuer in an action for slander was a notour bankrupt resident in England, the Court declined to order him to find caution.[6] And a bankrupt will not be compelled to find caution in actions of damages where there has been long delay.[7] A pursuer in an action of damages for illegal acts against his landlord was held not bound to find caution.[8] But where the Court was unfavourably impressed as to the *bona fides* of the pursuer of an action of damages for slander by an undischarged bankrupt, he was ordered to find caution within eight days.[9] Where the pursuer, though an undischarged bankrupt, is still in the administration of his affairs, and is allowed to conduct his own business, an exception to the rule will generally be allowed. Thus, where two years prior to the raising of an action decree of cessio had been awarded against the pursuer, but the trustee had never extracted his appointment and the insolvent continued to carry on his business,

[1] Harvey *v.* Farquhar, 1870, 8 M. 971.

[2] Douglas *v.* M'Kinlay, 1902, 5 F. 260.

[3] Cook *v.* Kinghorn, 1904, 12 S.L.T. 186 (O.H.); Brown *v.* Oliver & Co., 1895, 3 S.L.T. 43 (O.H.); Munro *v.* Mudie, 1901, 9 S.L.T. 53 (O.H.); Watson *v.* Williamson, 1895, 3 S.L.T. 21.

[4] Clarke *v.* Muller, 1884, 11 R. 418.

[5] Scott *v.* Johnstone, 1885, 12 R. 1022; Thom *v.* Andrew, 1888, 15 R. 780, *see per* Ld. Young.

[6] Macrae *v.* Sutherland, 1889, 16 R. 476.

[7] Collier *v.* Ritchie & Co., 1884, 12 R. 47; Scott *v.* Roy, 1886, 13 R. 1173.

[8] Paul *v.* Gray, 1894, 1 S.L.T. 575 (O.H.).

[9] Powell *v.* Long, 1896, 23 R. 955.

the Court refused a motion that he be ordained to find caution.[1] So, where a pursuer who was an undischarged bankrupt, but who for thirteen years had carried on his trade free from the interference of his creditors, the Court refused to ordain him to find security.[2] And though an award of sequestration deprives the bankrupt of all his property and his rights and interests in it for distribution among his creditors, the radical right in his estate remains with him,[3] and he is therefore entitled to demand from the trustee an accounting of his intromissions with and management of the estate, and to claim any part of it which has been abandoned by the creditors or not taken up by the trustee. In such cases the pursuer will not in general be required to find caution.[4] Where the pursuer's bankruptcy supervenes after he has obtained a judgment in his favour, he will not as a rule be required to find caution as a condition of insisting in an appeal which is lodged against the judgment in his favour.[5] And the Court refused a motion to have a bankrupt ordained to find caution where he was appealing from an interlocutor of the Sheriff refusing his discharge.[6] But in an appeal by a bankrupt against a deliverance on his claim in another sequestration, he must in general find caution in the usual way.[7] As the personal earnings of a bankrupt acquired subsequent to his sequestration and prior to his discharge do not vest in the trustee, provided they are the product solely of his brains and hands, a person suing with respect to such earnings is in the same position as any other person, and therefore will not be required to find caution.[8] But a claim by an undischarged bankrupt for a share of the profits of a syndicate which he had helped to form, in name of remuneration for his services, is not a claim for sums earned by his personal labour, and in such a case he will be ordered to find caution.[9] An undischarged bankrupt, however, who sued for arrears of wages due to him under

[1] Kennedy *v.* Crawford, 1899, 7 S.L.T. 38 (O.H.).

[2] Thom *v.* Cal. Rly. Co., 1902, 9 S.L.R. 377; Burnett *v.* Murray, 1877, 14 S.L.R. 616.

[3] *See* Wallace on Bankruptcy, p. 161, and cases there cited.

[4] Cooper *v.* Frame, 1893, 20 R. 920; Ritchie *v.* Macintosh, 1881, 8 R. 747; Rogerson *v.* Rogerson's Trs., 1885, 22 S.L.R. 673.

[5] Ferguson *v.* Leslie, 1873, 11 S.L.R. 16; Lawson's Trs. *v.* British Linen Bank, 1874, 1 R. 1065.

[6] Heddle *v.* Melrose Drover, 1905, 7 F. 852.

[7] Stewart *v.* Dunmore's Trs., 1891, 19 R. 4.

[8] *See* Wallace on Bankruptcy, p. 220–1.

[9] Buchanan *v.* Peyton, 1897, 4 S.L.T. 446 (O.H.).

an arrangement between him and the defenders, entered into after his sequestration, was held not bound to find caution for expenses.[1] On similar grounds, where an undischarged bankrupt sues an action in relation to a matter in which his trustee or creditors have no concern or interest, as where he sues his father's trustees in relation to an alimentary fund in which his trustee is not concerned, he will not be ordained to find caution.[2] Again, where, notwithstanding his bankruptcy, the pursuer has still a substantial interest in the subject of the action, no caution will be required. Thus, where, in a declarator that the bankrupt had been discharged by certain creditors, a *prima facie* case was disclosed by production of a discharge although with the signatures cancelled, the bankrupt was allowed to proceed with the action without finding caution.[3] And a husband against whom a decree of cessio has been pronounced may sue an action of divorce for adultery against his wife, and of damages against her paramour, without finding caution for expenses.[4] Where a defender moves that the pursuer be ordained to find caution on the ground that he is divested of his estate or of his interest in the subject matter of the action, as by sequestration, cessio, or trust-deed, he must be in a position to prove his averment. Thus the Court in one case refused to accept as evidence of the pursuer's divestiture an unstamped deed in favour of the trustee.[5]

*Mere Poverty insufficient.*—Mere poverty, even if of such a kind as to amount to notorious insolvency, is not sufficient in general to subject the pursuer to the necessity of finding caution. Thus, where an action for slander by a bankrupt had been dismissed in respect of his failure to find caution for expenses, he was allowed after his discharge to raise another action containing the same averments without finding caution, although an interval of ten years intervened between the two actions, the delay in raising the second action being due to the fact that during the whole time he had been an undischarged bankrupt and unable to find caution.[6] A pauper in receipt of parochial relief, unless admitted to the poor's-roll, will, however, in general be required to find caution, even in an action

[1] M'Call *v.* Gettens, 1905, 13 S.L.T. 149 (O.H.).

[2] Paton *v.* Paton's Trs., 1901, 8 S.L.T. 361 (O.H.).

[3] M'Alister *v.* Swinburne, 1873, 1 R. 166.

[4] Derrick *v.* Derrick, 1900, 8 S.L.T. 247 (O.H.).

[5] Macqueen *v.* Murdoch, 1861, 23 D. 725.

[6] Cunningham *v.* Skinner, 1902, 4 F. 1124.

for vindication of his character.[1] In one case, however, a widow in receipt of parochial relief was allowed to sue her late husband's employers for damages without finding caution, the reason for her being under the necessity of applying for relief being due to the fact that her husband's death was occasioned by fault or negligence for which the defenders were legally responsible.[2] And on somewhat similar grounds the Court refused to order caution in the case of a party suing certain persons whose misconduct, he alleged, had brought about his poverty, and against whom he had shown he had a probable cause of action by getting himself on the poor's roll.[3] Where an applicant for the benefit of the poor's roll is reported as having no *probabilis causa litigandi*, and is therefore refused admission, he may sue the action without being required to find caution.[4] A pauper who sued an action of declarator of heritage was held entitled to do so without finding caution.[5]

In certain circumstances, where the nature of the claim made is open to suspicion, and the fact that the actual pursuer is *prima facie* not in a position to pay expenses, the Court may order caution to be found. Thus a married woman who sued without her husband's consent, and who, although in poverty, made no attempt to obtain the benefit of the poor's roll, was ordered to find caution.[6] In another case, where a married woman, without disclosing the fact that she was married, and without her husband's consent, sued an action for recovery of her paraphernal property, the Court held that she was not bound to find caution.[7] But where the wife of an undischarged bankrupt sued with her husband's consent an action for damages for an assault alleged to have been committed on her by the defender four years previously, the Court, considering the whole circumstances suspicious, ordered her to find caution.[8] Again, where a debtor, on the eve of a charge of payment for a debt decerned against him in an action, fled the country, and decree of

[1] Hunter *v.* Clark, 1874, 1 R. 1154; Robertson *v.* Midlothian C.C., 1898, 25 R. 569; Fraser *v.* Macintosh, 1901, 9 S.L.T. 98 (O.H.).

[2] Macdonald *v.* Simpson, 1882, 9 R. 696.

[3] Weepers *v.* Pearson, 1859, 21 D. 305; Burnett *v.* Murray, 1877, 14 S.L.R. 616.

[4] Thomson *v.* N.B. Rly. Co., 1882, 9 R. 1102; *but see* Robertson *v.* Meikle, 1890, 28 S.L.R. 18.

[5] Johnston *v.* Dryden, 1890, 18 R. 191.

[6] Teulon *v.* Smith, 1885, 12 R. 971.

[7] Sleigh *v.* Yeaman, 1900, 8 S.L.T. 101 (O.H.), *distinguishing* Teulon *v.* Smith, *sup.*

[8] Green *v.* Grant, 1899, 1 F. 701.

cessio was obtained against him, it was held that in an action for reduction of the decree of cessio he must find caution for expenses.[1] Where a firm was sequestrated, but the sole partner on the day of sequestration assumed his son, who had no visible means, as a copartner, the new firm was held not entitled to sue without caution.[2] On similar grounds, where a person without means is put forward as pursuer, in order to evade liability for expenses, in place of the true *dominus litis*, he will be ordered to find caution. So persons whose patrimonial interest is small, suing an *actio popularis* in vindication of public rights, are generally required to find caution. Thus, where the pursuer is obviously a man of straw with a committee behind him, it would be subversive of justice to make the defender defend a case against a person who, if found liable, would be unable to pay expenses.[3] In one case for declarator of a right of way, where the defender alleged that the pursuer was a man of straw put forward by the real pursuers to avoid liability for expenses, the Court allowed a preliminary proof of the defender's averment.[4]

*Where Pursuer a Registered Company.*—Under section 69 of the Companies Act 1862, a company suing an action may be required to find caution where it appears that its assets are insufficient for the payment of defender's expenses, and the Court has power to stay all proceedings until such caution is found.[5] Where on a company obtaining a decree in the Sheriff Court the defender appealed, it was held on the subsequent liquidation of the company that it was not bound to find caution, being *prima facie* in the right.[6]

**Defenders.**—The position of a defender with regard to the necessity of finding caution differs materially from that of a pursuer, and it is only in exceptional circumstances that he will be ordained to find caution.[7] Thus, where a defender holds a judgment of an inferior Court in his favour, it will be a clear waste of time to move

[1] Gilmour *v.* Donnelly, 1899, 7 S.L.T. 267 (O.H.).

[2] Fraser *v.* Mackenzie, 1874, 12 S.L.R. 74.

[3] Jenkins *v.* Robertson, 1869, 7 M. 739; Hepburn *v.* Tait, 1874, 1 R. 875; Potter *v.* Hamilton, 1870, 8 M. 1064.

[4] Robertson *v.* D. of Atholl, 1905, 48 S.L.R. 601 (O.H.); *see also* Porteous *v.* Pearl Life Ass. Co., 1901, 8 S.L.T. 340 (O.H.).

[5] English Coasting Co. *v.* Brit. Finance Co. Ltd., 1886, 13 R. 1430. Southern Bowling Club *v.* Edin. "Evening News," 1901, 9 S.L.T. 24 (O.H.), *motion refused.*

[6] Star Fire Ins. Co. *v.* Davidson & Sons, 1902, 4 F. 997; Sinclair *v.* Glasgow and London Contract Corpn., 1904, 6 F. 818.

[7] Drew *v.* Robertson, 1903, 11 S.L.T. 31 (O.H.).

the Court that he should be ordained to find caution;[1] even the fact that a defender appeals against a judgment adverse to him is no ground *per se* for ordering him to find caution.[2] And where a defender reclaimed and, pending the hearing of the reclaiming note, granted a trust-deed, the Court refused to order him to find caution.[3] A defender who defended an action of reduction on the ground of fraud,[4] a defender who had granted a trust-deed defending an action of accounting raised against him,[5] and a defender who during the litigation had gone abroad,[6] were each absolved from the necessity of finding caution. But in one case where the defender in a filiation case had gone abroad the Sheriff was held to have been justified in ordering him to find caution.[7] There may, however, be extreme cases in which the Court in the exercise of its discretion will think it right to ordain the defender to find caution. Thus, if a bankrupt, at a time when he is well and properly represented by his trustees, should take the action out of their hands and persist in going on with a vexatious litigation,[8] or if he should dispossess himself by granting a trust-deed after proceedings in the action had raised a strong case against him,[9] the Court may order him to find caution. So in the case of a bankrupt defender who defends an action in which he has no interest.[10] And where the nominal defender is really the pursuer the matter will be disposed of according to the rules regulating the case of a pursuer. Thus a bankrupt litigating with his trustee regarding his estate will be ordered to find caution.[11] Where three defenders were sued jointly and severally for a sum in name of damages, and all were sequestrated, the Court, on the trustee for one of the parties sisting himself, sisted the action against the remaining defenders and allowed it to proceed against the compearing trustee.[12] Where a bankrupt defender, whose trustee would not sist

[1] Bell *v.* Forrest, 1848, 2 D. 1460.

[2] Weir *v.* Buchanan, 1876, 4 R. 8; Buchanan *v.* Stevenson, 1880, 8 R. 220; D'Ernesti *v.* D'Ernesti, 1882, 9 R. 655.

[3] Johnstone *v.* Henderson, 1906, 8 F. 689.

[4] Steven *v.* Fleming, 1885, 22 S.L.R. 673.

[5] Lawrie *v.* Pearson, 1888, 16 R. 62.

[6] Bunten *v.* Aitkenhead, 1892, 19 R. 803; Walkinshaw *v.* Stewart, 1891, 18 R. 491.

[7] Bracken *v.* Blasquez, 1891, 18 R. 819; Young *v.* Carter, 1906, 14 S.L.T. 411 (O.H.).

[8] Taylor *v.* Fairley's Trs., 1833, 6 W. & S., 301.

[9] Stevenson *v.* Lee, 1886, 13 R. 913.

[10] Smith's Trs. *v.* M'Cheyne, 1879, 16 S.L.R. 592.

[11] Jackson *v.* Lamont, 1889, 17 R. 282.

[12] Crighton Bros. *v.* Crighton, 1902, 5 F. 178.

himself as a party to the action, admitted an account but claimed a set-off, the Court ordered him to find caution on the ground that he was truly the pursuer in the only part of the case which was disputed.[1]

**Amount of Caution.**—It was formerly a matter for discussion whether a party ordered to find caution should find it for all expenses, past as well as future, and the two Divisions of the Court took divergent views.[2] It has, however, been authoritatively settled that an interlocutor ordaining a party to find caution for expenses means that such party shall find caution for "future" expenses only.[3]

**Renewal of Caution.**—A cautioner, like a mandatary, may withdraw at any time, but he remains liable for expenses incurred while he held office. If a cautioner withdraw or become bankrupt, a new cautioner must be sisted in his place.[4] But a party may bar himself from demanding that a new cautioner should be sisted if he have been the means of inducing the cautioner to withdraw.[5]

**Time for Motion.**—The motion that a party should be ordained to find caution must be made timeously, and a party may be barred by *mora*, as where the motion is made on the eve of trial,[6] or under circumstances tending to show that it is not made in *bona fides* but solely for the purpose of obtaining delay.

### 3. Failure to Consign, Find Caution, or Sist Mandatary

When a party is ordered to make consignation, to find caution, or to sist a mandatary, the interlocutor making the order usually stipulates that it shall be implemented within a certain time, and the process may or may not, according to the discretion of the Sheriff, be sisted meantime. Failure to obey such an order was, prior to the Act of 1907, treated as a default, but the prior Acts contained no special provision with reference to a failure to implement an order of Court unless such order related to the lodging of pleadings or productions in the cause.[7] While in cases in which the

[1] Robb *v.* Dickson, 1901, 9 S.L.T. 183 (O.H.).

[2] Maxwell *v.* Maxwell, 1847, 9 D. 797; Mackersy *v.* Muir, 1850, 12 D. 1057.

[3] Douglas *v.* M'Kinlay, 1902, 5 F. 260.

[4] A. B. *v.* C. D., 1836, 15 S. 158.

[5] Oliver *v.* Robertson, 1869, 8 M. 82, *see per* L. Neaves.

[6] Simpson *v.* Allan, 1894, 31 S.L.R. 572.

[7] Act 1853, s. 6; Act 1876, s. 20.

default was due to the defender a decree as craved was invariably pronounced,[1] in the case of a defaulting pursuer some difference in practice existed as to the course to be followed, the Court in some cases dismissing the action,[2] in others assoilzieing the defender.[3] Obviously the latter course, though a severe one, was the more appropriate, and in the later decisions the tendency of the Court was towards its adoption.[4] The Act of 1907, however, provides specifically that where an order of the Sheriff has not been implemented within the time specified in the interlocutor, the Sheriff may grant decree as craved, or of absolvitor, or may dismiss the action with expenses, though he may, upon cause shown, prorogate the time for implementing the order.[5] The rule does not, it will be seen, in terms direct that a failure by a pursuer to implement an order shall necessarily be followed by a decree of absolvitor, and the Sheriff possesses the power in his discretion to dismiss the action instead. But a failure on the part of a defender will necessarily be followed by a decree in favour of the pursuer as craved, and it does not appear to consist with equity that in the case of a pursuer the default should be visited with any less severe penalty. To dismiss the action is only to afford the pursuer another opportunity of bringing a fresh action on the same grounds, and therefore to afford the pursuer a latitude which in the case of a defaulting defender is denied to him. That the rule contemplates that when a pursuer fails to obtemper an order of Court, his default shall be followed by a decree of absolvitor, seems sufficiently obvious from the terms of the rubric, which provides that the failure of either party to implement an order of Court entitles the other party to decree. While, of course, a decree dismissing the action is a decree in favour of the defender, yet obviously, if he is "entitled to decree," the decree which he will necessarily and invariably crave is one of absolvitor. The provision, however, that the Sheriff may dismiss the action with expenses leaves it in his discretion, in the event of the occurrence of exceptional circumstances, to pronounce such an interlocutor if he sees fit. In a recent case, where a committee appointed to examine into the affairs of a company reported dishonesty on the part of the managing

[1] Robb *v.* Middlesex Ass. Co., 1843, 5 D. 1025.

[2] Wylie *v.* Adam, 1836, 14 S. 430; Horn *v.* Sanderson, 1872, 10 M. 295.

[3] Gordon *v.* Gordon, 1822, 2 S. 93.

[4] Gray *v.* Ireland, 1884, 11 R. 1104; Teulon *v.* Seaton, 1885, 12 R. 1179.

[5] Act, Rule 56.

director, it was held that in suing the members of the committee for damages for slander he must put malice in his issue, and being bankrupt must find caution. On his failure to find caution the action was dismissed. Ten years later, during the whole of which time he was bankrupt and unable to find caution, he brought a fresh action on the same grounds, and the Court refused to hold the decree dismissing the former action as equivalent to a decree of absolvitor, and therefore *res judicata*.[1]

[1] Cunningham *v.* Skinner, 1902, 4 F. 1124.

# CHAPTER XVIII

## AMENDMENTS OR ADDITIONS TO THE PLEADINGS IN DEFENDED ACTIONS

1. Introductory


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### 1. Introductory

**Introductory.**—Prior to 1825, the power of amending the initial writ, or any of the other pleadings, was left to be exercised according to the discretion of the judges: but in that year the Judicature Act was passed, and a great degree of strictness was introduced. In the case of a pursuer, amendments of any kind were scarcely permitted, and after the closing of the record he could hardly even correct an obvious error. If he went wrong with his action, his remedy was to give it up, pay all expenses, and begin again. In the case of a defender to whom this remedy could not be made available, the strictness was perhaps hardly so great, but it was also very remarkable. This state of the law endured in the Court of Session till 1868, and in the Sheriff Court till 1876, when a considerable change was made. The decisions prior to these years are therefore now of no value, even for illustration.[1] The provisions made by the Act of 1876 were, with the necessary verbal alterations, precisely the same as those contained in the Court of Session Act 1868. When analysed, they are found to embody the following propositions:—

[1] Dove Wilson, 4th ed., pp. 238–9.

(1) Where there was any error or defect in the record, every amendment which might be necessary for the purpose of determining in the action the real question in controversy between the parties might be made, provided that

(2) No larger sum or estate, and no fund or property other than that specified in the petition, might by such amendment be made subject to the adjudication of the Sheriff, except with the consent of all parties interested.

(3) The amendment might be made by the Sheriff at any time.

(4) The Sheriff might allow the amendment conditionally upon such terms as to expenses or otherwise as he might think proper.

(5) An amendment could not invalidate diligence used on the dependence of the action so as to prejudice the right of creditors of the defender who were interested in defeating it; but

(6) The amendment operated to obviate objections to the diligence when stated by the defender, or by those obtaining right or title through him after it was executed.

In all ordinary circumstances, a party possessed an absolute right to make every competent amendment, the only control which the Sheriff might competently exercise being to ensure that the conditions which he attached to the exercise of the right were such as to render its operation just. But it was decided that if the proposed amendment was altogether inexpedient, and brought forward in circumstances such as would conduce to the saving neither of time nor of money, its rejection was still competent.[1] A "competent" amendment was one which was necessary to correct any error or defect in the record for the purpose of determining in the action the real question in controversy between the parties, the expression record being wide enough to include both the initial writ and the subsequent pleadings of the parties. The real question in controversy between the parties was held to mean the question which was intended to be raised by the initial petition.[2] But the amendment could not, save with the consent of the parties, competently subject to the adjudication of the Sheriff any larger sum or estate or any other fund or property than that specified in the petition,[3] though an amendment which

[1] Taylor *v.* Macdougal, 1885, 12 R. 1304; Macleod *v.* Harrison, 1880, 8 R. 227.

[2] Gibson's Trs. *v.* Fraser, 1877, 4 R. 1001; Forbes *v.* Watt's Trs., 1870, 9 M. 96.

[3] *See* Laming *v.* Seater, 1889, 16 R. 828; Shotts Iron Co. *v.* Turnbull, 1870, 8 M. 383.

altered the grounds of action but left the real question in controversy unchanged was competent. For example, in an action for breach of warranty, an averment that the warranty was in writing might competently have been altered to one that it was verbal,[1] and in an action for payment of a contract price the introduction of an alternative conclusion for damages was held to be competent. Similarly in an action which originally sued for damages, an alternative conclusion for restoration of the subject was held to be competently added by way of amendment.[2] But in an action in which a claim was made for repayment of specific sums paid owing to the breach of a contract, a conclusion for damages for breach of the contract arrived at by a different method of computation was not permitted to be added by way of amendment,[3] though in a subsequent case a pursuer of an action for repayment of a specific sum advanced to the defender was allowed to amend his record so as to enable him to claim the same sum in name of damages.[4] Though not competent in the case of a pursuer, a defender might always competently enlarge the grounds of his defence, as, for instance, where in an action for defamation a defence of *veritas* was allowed to be added.[5] In the case of a pursuer desirous of adding to or extending his claim as originally laid, it was necessary formerly to raise a supplementary action, though such an action was not always competent. Thus a supplementary action to increase a claim of damages was incompetent,[6] as was a supplementary summons to amend one which was radically bad.[7] And a supplementary action concluding for the payment of interest omitted in the original action was equally incompetent.[8] On similar principles, a person who had brought an irrelevant action which might have been amended so as to make it relevant, was held not entitled to escape the penalty of paying the expenses consequent on his amendment, by adopting the device of allowing absolvitor from the action as laid in order to raise a new one.[9]

[1] Rose *v.* Johnston, 1878, 5 R. 600.

[2] Stewart *v.* Clark, 1887, *see* Mackay's Prac. 1, 485.

[3] Russell, Hope, & Co. *v.* Pillans, 1895, 23 R. 256.

[4] Rottenburg *v.* Duncan & Others, 1896, 24 R. 35; *see also* Hannay & Others *v.* Muir & Others, 1898, 1 F. 306.

[5] Keith *v.* Outram, 1877, 4 R. 958.

[6] Parker *v.* N. B. Ry. Co., 1899, 1 F. 872; Goodwins, Jardine, & Co. *v.* Brand & Son, 1903, 11 S.L.T. 482 (O.H.).

[7] Munro *v.* Hutchison and Others, 1896, 3 S.L.T. 413 (O.H.).

[8] Edin. & Glas. Union Canal *v.* Carmichael, 1842, 1 Bell's Ap. Ca. 316.

[9] M'Murchy *v.* Maclullich, 1889, 16 R. 678.

Again, since an amendment might be allowed which did not alter the nature of the question in controversy, the prayer of the petition might competently be restricted or partially departed from, provided always that the nature of the question in controversy was not thereby altered or enlarged. Thus the real question in controversy was held to be altered so as to preclude the amendment where a person who sued as an individual sought to sue as a trustee or executor,[1] though an amendment was allowed altering the conclusions from payment to the pursuer to payment to his trustees.[2] And a pursuer of an action to enforce, who had failed to prove a written agreement consisting of several heads, was not allowed to restrict his claim so as to enforce a verbal agreement as to one of the heads.[3] So a defender maintaining the non-existence of a lease was not allowed, after its existence had been established, to amend his defence so as to maintain that certain specified subjects did not fall within it.[4] Similarly a claim to an absolute right in certain subjects could not competently be amended so as to convert the claim into one for a *pro indiviso* right only.[5] But where the amendment only proposed to rectify a misdescription of the subject of the action, it was held competent.[6] And where a summons proceeded at the instance of five different pursuers who sued for five distinct debts, it was held competent to amend it by striking out four of the pursuers and the relative conclusions.[7] On the other hand, where a summons contained three conclusions the third of which was merely ancillary to the other two, the pursuer was held not entitled to abandon the first two and to insist only in the third.[8] Though in an action which concluded jointly and severally or severally for a lump sum against several defenders, only some of whom were said to be responsible for part of the wrong which formed the ground of claim, leave to amend was refused and the action was dismissed.[9] An amendment was allowed which added "or severally" to a summons containing only joint and several conclusions.[10] And in actions relating to bills and

[1] Turnbull *v.* Veitch, 1889, 16 R. 1079.

[2] Carruthers *v.* Cairns, 1890, 17 R. 769.

[3] Gibson's Trs. *v.* Fraser, *sup.*

[4] Forbes *v.* Watt's Trs., 1870, 9 M. 96.

[5] Leny *v.* Mags. of Dunfermline, 1894, 21 R. 749.

[6] Cairns *v.* Lee, 1892, 20 R. 16.

[7] Fischer *v.* Anderson, 1896, 23 R. 395.

[8] Skerret *v.* Oliver, 1896, 23 R. 468.

[9] Conway *v.* Dalziel & Others, 1901, 3 F. 918.

[10] Cook *v.* Barnton Hotel Co., 1900 2 F. 1011.

promissory notes, where the bill or note was not referred to in the summons, an amendment was permitted which included a reference to it,[1] and conversely where the summons concluded for payment of the sum as being contained in a bill of exchange an amendment was allowed which concluded for payment of the sum itself, with corresponding necessary amendments in the pleadings.[2]

Where the amendment was competent it might be made at any time during the course of the action, after proof,[3] or even after the judge had taken the case to *avizandum*,[4] though the Court might refuse to grant delay, after the case was heard, to allow the party desirous of amending an opportunity of considering as to the amendment necessary.[5] But the amendment was refused if made in circumstances such as to render the previous procedure useless.[6] or after judgment had been delivered though the interlocutor had not actually been signed.[7] So it was refused after parties had lodged a joint minute of admissions and had renounced probation,[8] and after a claim had been repelled in a multiplepoinding.[9] In an action for injuries brought under the common law, an amendment founding on the Employers' Liability Act of 1880 was refused, on the ground that at the time when the amendment was proposed the period under which such an action could be raised under the Act had expired.[10] But leave was granted to a pursuer of an action concluding for damages under the Employers' Liability Act to amend his summons by concluding for a sum both at common law and under the Act.[11]

The Sheriff had, however, under the provisions of the Act of 1876, as he has under those of the Act of 1907, an uncontrolled discretion as to the conditions with regard to expenses or otherwise under

[1] Bank of Scotland *v.* Ferguson, 1898, 1 F. 96; Sanderson *v.* Bryden, 1898, 5 S.L.T. 478 (O.H.).

[2] Hope *v.* Derwent Rolling Mills Co. Ld., 1905, 7 F. 837.

[3] Arnott *v.* Burt, 1872, 11 M. 62; Rose *v.* Johnston, 1878, 5 R. 600; Guinness & Co. *v.* Goodwin & Co., 1891, 18 R. 441; Cochrane *v.* Russell, 1891, 28 S.L.R. 697.

[4] Gray *v.* Scot. Soc. for Prev. of Cru. to Anls., 1890, 17 R. 789; Govan Rope & Sail Co. *v.* Weir, 1897, 24 R. 368.

[5] Menzies *v.* Menzies, 1890, 17 R. 881.

[6] North Berwick Gas Co. *v.* Robertson, 1884, 22 S.L.R. 93.

[7] Mackenzie *v.* Munro, 1869, 7 M. 676.

[8] Carsewell *v.* Finlay, 1887, 24 S.L.R. 643.

[9] Terrell *v.* Ker, 1900, 2 F. 1055; Wilson's Trs. *v.* Clydesdale Bank, 1900, 8 S.L.T. 23 (O.H.).

[10] Clark *v.* Adams, 1885, 12 R. 1092.

[11] O'Donnell *v.* Russell, 1906, 14 S.L.T. 437 (O.H.).

which an amendment if otherwise competent might be allowed. The effect of the amendment when made was precisely similar to that which is effected under the provisions of the Act of 1907. The only remaining point which it seems necessary to notice, before proceeding to deal with the alterations affected by the Act of 1907, is that which has reference to the addition of matters coming to the knowledge of the party after the record had been closed. The Act of 1876 made provision for the amendment of the pleadings with reference to matters which were or ought to have been known to the parties at the date of the lodging of their respective pleadings. The Act of Sederunt of 1839, section 58, made provision, on the other hand, for regulating the lodging of a statement of any matter of fact or document *noviter veniens ad notitiam* or emerging since the record was closed. The provision was seldom made use of subsequent to the passing of the Act of 1876, since under that Act, as has been seen, *res noviter* might competently be added by way of amendment, but it was the competent and strictly speaking only accurate method by which *res noviter* might be added to the pleadings. Where a fact came to the knowledge of a party which he had not known and could not by the exercise of reasonable precautions have discovered before the closing of the record, he might competently at any time before final judgment was pronounced apply by motion or note for leave to lodge a statement of the new matter of fact. He was then permitted by the Sheriff to lodge a minute containing a condescendence of the *res noviter* and of the manner in which it came to his knowledge, and to that minute answers were ordered by the Sheriff. If satisfied, either upon proof or otherwise, the Sheriff then admitted the *res noviter*, allowed answers to it to be lodged by the opposite party, and of new closed the record upon the additional papers.

The provisions of the Act of 1876 are identical with those contained in section 29 of the Court of Session Act of 1868, which till 1907 still regulated the practice of the Supreme Court with regard to amending, altering, or adding to the pleadings of actions instituted before it, and most of the cases which have been cited in the foregoing sketch were decided with reference to cases in the Court of Session. The procedure of the Court of Session is now regulated by the Act of Sederunt of 20th March 1907, section 2 of which corresponds in its provisions to section 79 of the Sheriff Court Act of 1907.

## 2. The Act of 1907.

**Generally.**—The Act introduces alterations and innovations of so sweeping a character as to revolutionise the practice and procedure of the Sheriff Court with reference to amendments, alterations, and additions to the record. Indeed, the powers now conferred upon the Sheriff, having regard solely to the terminology of the section of the Act, would almost appear to exceed those conferred upon the Supreme Court by the Act of Sederunt already referred to. The provisions of the Act are that upon the motion of either party the Sheriff may, at any stage of the cause, and upon such conditions as to expenses, reservice, or otherwise as he may deem proper, allow a record to be amended or altered to the effect of determining the real question in controversy (including amendment of the instance and the initial writ and the adding of parties), notwithstanding that the conclusions of the action may thereby be enlarged or altered.[1]

Comparing this provision in the first place with the similar provisions of the Act of 1876, it will be seen that while it is still necessary, to make a proposed amendment competent, that it should be such as to have the effect of enabling the real question in controversy to be determined, the necessity for the amendment need not be due to any "error" or "defect" either in the initial writ or in the pleadings of the parties. And provided only that the amendment is of such a character as is required by the rule, it would appear to be immaterial whether the alteration, addition, or amendment be one which is rendered necessary owing to error or defect in the initial writ or in the pleadings, and which might therefore have been anticipated at the time when the action was raised or the pleading lodged, or whether it is rendered necessary owing to disclosures occurring during the course of the litigation, or to facts *venientes ad notitiam* since the raising of the action or the closing of the record. Secondly, the instance may be competently amended, so as either to change the character in which the pursuer sues the action, to effect an alteration, verbal or other, in the pursuer's name or designation, or to introduce parties who were not parties to the action as originally laid. Formerly, a new pursuer could not be added without the defender's consent.[2] Thirdly, the initial writ may

[1] Act, Rule 79.

[2] Hyslop *v.* MacRitchie's Trs., 1881, 8 R. (H. L.) 95 *per* L. Watson.

be amended to the effect that the conclusions of the action may be enlarged or altered, provided always the amendment be such as to affect the determination of the real question in controversy. The precise effect of this provision must be left to judicial interpretation, but any amendment which might have the effect of radically or even materially altering the character of the action as originally laid, or of effecting a radical change in the real question at issue, would probably, as under the former provisions, be still regarded as incompetent. The Act of 1876 contemplated amendments necessary to determine the question in controversy between the parties, that is the parties to the action as originally laid. Since, however, under the provisions of the rule in the Act of 1907, new parties may be added, the amendment need only be such as to affect the determination of the question in controversy, not necessarily between the original parties, but as between the parties who may be added to the case at any time before judgment. But the "question in controversy" is probably the question which the writ intends to raise. Fourthly, additional defenders may be convened to the action by a simple amendment, without the necessity, as formerly, of a supplementary action. Formerly a new defender could not be added without his own consent, nor could the conclusion against separate sets of defenders be altered. Accordingly, where formerly a plea that all parties had not been called was sustained, the pursuer might intimate the action to such parties with the object of inducing them to join in the litigation, but he could not force them to defend except by raising a supplementary action.

In considering the effect of these provisions, and comparing them with the corresponding provisions of the Act of Sederunt of 20th March 1907 regulating the procedure of the Court of Session, it may be assumed that the Legislature had not in contemplation the conferring of privileges and rights upon litigants in the Sheriff Court which are denied to them in proceedings before the Supreme Court, or the bestowal upon judges in the Sheriff Court of a power of amendment more ample than, or essentially different from, that which may be exercised by judges in the Court of Session. And it may perhaps be further assumed that the intention of the framers of the Act and of the Legislature in giving legislative sanction to that intention, was, so far as might be possible or practicable, to assimilate the practice and procedure of the Sheriff and of the

Supreme Courts, so far at least as related to this particular branch of procedure. A comparison of the provisions of the Act of 1907 with those of the Act of Sederunt makes it obvious that those applicable to the Sheriff Court are nowhere expressly and in terms qualified by the restrictions imposed upon the powers of amendment exercised by the Judges in the Court of Session under the Act of Sederunt, though it is equally apparent that nowhere does the Act even by inference suggest that its provisions are to be construed by a reference to the regulations affecting existing practice in the Court of Session. And while, no doubt, it is true that an Act which specifically applies only to procedure in the Sheriff Court will be construed by the Supreme Court according to its plain intention and meaning, and provided that in unambiguous terms it confers a power upon that Court which is denied to or is not possessed by the Supreme Court, the exercise of that power will be confirmed by the Supreme Court on appeal, it must not be forgotten that the Supreme Court possesses under the provisions of the Act the power to regulate procedure in the Sheriff Court by passing an Act of Sederunt either abrogating or amending the powers conferred upon that Court by the Schedule of the Act, and that the interpretation of the precise meaning of the language of the Statute regulating procedure in the Sheriff Court ultimately rests upon the decisions of the Court of Session. Until, therefore, the Supreme Court expressly affirms that the language of the Rule regulating procedure in amendments in the Sheriff Court is to be interpreted as conferring upon that Court powers in excess of or differing from those conferred upon itself under the Act of Sederunt of 20th March 1907, it may with safety be assumed that no higher or other powers are conferred upon the Sheriff Court by the Act than are conferred upon the Court of Session by the Act of Sederunt mentioned.

The rules regulating amendments in the Sheriff Court may therefore be summarised thus:—

*Amendment of Instance and Adding of Parties.*—(1) (*a*) Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or (*b*) where it has been commenced without a person whose conjunction may be deemed necessary to make the instance good, or (*c*) where it is doubtful whether it has been commenced in the name of the right person, the Sheriff, if satisfied that it has been so commenced through *bona fide* mistake, and that it is neces-

sary for the determination of the real matter in dispute, may allow any other person to be sisted as pursuer in substitution for or in addition to the original party, on such conditions as to expenses as he may deem proper.

(2) Where a party sues or is sued in a representative character, but it appears he ought to have sued or been sued in his own right, or *vice versa*, the Sheriff may on the motion of either party, and on such terms as to expenses as he may deem proper, amend the record accordingly, the action thereupon proceeding in all respects as if the proper description of the party had been given in the initial writ.

(3) The name or description of the pursuer or defender, if insufficiently or incorrectly given in the initial writ, may be amended at the instance of either party on such conditions as to expenses as the Sheriff may deem proper, the action thereafter proceeding as if the name or description had been originally such as it appears after the amendment has been made. If, however, no objection be taken to the name or description as originally given, the action may proceed, and in the judgment and all subsequent proceedings founded upon it the party may be named and described in the same manner as in the initial writ.

(4) Where in the course of an action it appears that all parties interested have not been called, the Sheriff may allow the record to be amended by the insertion in the initial writ of the name of such additional defender, and may allow the record as amended to be served upon him along with a notice (of the dependence of the action and of the fact that he is called as a defender) specifying the day on which he must lodge defences or answers as the case may be. If such defender fail to lodge defences or answers by the appointed day, the pursuer becomes entitled to take decree against him in the undefended roll. If defences are lodged, the record is made up so as to include them. The pursuer may be found liable for any expenses occasioned to the original defender by his failure to call such added defender in the first instance, unless cause be shown to the contrary. The Sheriff must make it a condition of allowing the amendment that such expenses shall first be paid, unless he is satisfied that the pursuer had sufficient reason for not calling the added defender in the first instance.

*Altering or increasing Conclusions.*—At any time before final judgment, the pursuer may amend the initial writ to the effect of

increasing the sum for which he sues, or subjecting any other additional funds or property to the adjudication of the Court, on such terms as the Sheriff may deem proper. Such an amendment must be allowed in all cases where, according to former practice, it would have been competent to raise a supplementary action, but in all other cases it may be allowed in the discretion of the Sheriff.

*Increasing or altering remedy sought.*—Any amendment of the initial writ which may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy may be allowed, on such conditions as to expenses as the Sheriff may deem proper, notwithstanding that in consequence of such amendment a larger or different remedy than that originally concluded for is thereby sought.

**Discretion of Sheriff.**—Under the provisions of the Act of 1876, parties were entitled as matter of right, subject to certain conditions as to expenses and otherwise, to make any competent amendment. The Act of 1907 does not in terms affirm the right of the parties to make *any* amendment, competent or other, as a matter of right, and appears in all cases to give the Sheriff an absolute discretion as to whether a proposed amendment, alteration, or addition shall be permitted or not. Under the provisions of the Act of Sederunt applicable to the Court of Session, the Judges of that Court are similarly permitted an absolute discretion as to allowing an amendment, with one exception. An amendment of the initial writ which has the effect of increasing the sum sued for *must* be permitted in all cases where, according to former practice, a supplementary action would have been competent. Presumably a similar rule will hold good in the Sheriff Court. In any event, and in all cases, the Sheriff possesses the power of allowing an amendment, only subject to such conditions as to expenses, re-service, or otherwise as he may deem proper. Under the word "otherwise" no doubt the power to order caution or consignation must be included.

**Time and Mode of Amending.**—The amendment may be made at any stage of the cause before final judgment. No alteration is in this respect effected by the Act, and the decisions, already noticed, applying to the similar provision in the Act of 1876 are still applicable. No statutory provision is made for the mode in which an amendment is to be carried out. If the amendment is merely verbal or unimportant, no doubt it will in practice be effected by

motion. Any other amendment or alteration of the record will be made by minute, on which parties may be heard. If the amendment be allowed—and in practice it can hardly be doubted there will be few amendments which will be wholly disallowed—the Sheriff will also allow any necessary answer to be lodged, which if long may be embodied in a minute, and subsequently, like the amendment, added to the pleadings. An interlocutor allowing the amendment and the answer, if any, is then pronounced, and the amendment and answer are added to the pleadings of the parties and duly authenticated. Amendments are, however, frequently made in practice at revisal of the pleadings, and though, strictly speaking, all additions or alterations other than those made merely by way of revisal are incompetent without leave, yet if no objection be made by the opposite party at the time, not only will such amendments be permitted as if regularly made, but the party failing to object timeously will bar himself from the right to object subsequently.[1]

**Conditions of Amending.**—As under the Act of 1876, the Sheriff has an uncontrolled discretion as to the conditions as to expenses, re-service, or otherwise, on which an amendment will be permitted. As the addition of new defenders without their consent is now for the first time permitted by way of amendment, so the provision as to re-service is new. The matter of intimation to a new defender is left to the discretion of the Sheriff, and though there will doubtless be many cases in which service by an officer of Court will be prudent, as where the defender is a foreigner or outwith the jurisdiction of the Court, in practice it will probably in most cases be effected by means of a registered postal letter.[2] The general rule is that the expense caused by or connected with the amendment is borne by the party amending, but the terms are entirely in the discretion of the Sheriff.

**Effect of Amendment.**—An amendment does not have the effect of validating diligence used prior thereto on the dependence of the action, so as to prejudice the rights of creditors of the defender interested in defeating such diligence. It, however, operates to the effect of obviating objection to such diligence when stated by the defender himself, or by any person representing him by a title or

[1] *See* Johnstone's Trs. *v.* Elliot, 1824, 2 Shaw's Ap. Ca. 461.

[2] For form of notice, *see* Sched. I. of the Act of Sederunt of 20th March 1907.

in right of a debt contracted by him subsequent to the execution of such diligence.[1] In other words, where arrestment or other diligence such as inhibition has been used on the dependence of an action, an amendment does not cure any defect on which the defender's creditors might have founded, so as to prejudice their rights. To affect prior creditors, the arrestments must be repeated, their effect dating not from the time when they were originally laid on, but from the time when they are so repeated. Creditors in right of debts contracted, or persons whose title is acquired subsequent to the execution of the original diligence, and the defender himself, are affected by the amendment, which is operative to meet objections stated by them. In strictness, as was justly observed with reference to the corresponding provision in the Act of 1876, the Statute should have made the amendment affect only those creditors who come in right of debts contracted after the amendment is made.[2]

**Second Amendments.**—Even under the practice in vogue prior to 1876, there never was any rule, though there was a strong prejudice, against second amendments, and cases are to be found where second[3] and even third[4] amendments were permitted. Under the rule of the Act of 1907, as under that of the Act of 1876, no objection to an amendment of an amendment can be sustained.[5]

[1] Act, Rule 80 ; Act 1876, S. 24.
[2] Dove Wilson, 4th ed., p. 245.
[3] Brodie *v.* Young, 1851, 13 D. 737.
[4] Hutton *v.* Douglas, 1851, 13 D. 804.
[5] Lynch *v.* Stewart, 1871, 9 M. 860, *per* L. Cowan.

# CHAPTER XIX

## ABANDONING, COMPROMISING, SISTING, AND CONJOINING ACTIONS, AND REMITTING ACTIONS *OB CONTINGENTIAM*

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### I. Abandonment of Action

An action depends so soon as the initial writ has been duly executed, and it continues to depend until the whole matter in dispute between the parties, including the question of expenses, is determined by a final judgment of the Court. So long as the action

continues to depend, the pursuer cannot withdraw from it by any extra-judicial act. If, therefore, for any reason he desires to avoid a decree of absolvitor, he must either proceed with the action in the hope of either obtaining a decree of dismissal or one in his favour, or he must abandon it according to established forms with the sanction of the Judge. A decree of absolvitor, unlike one merely dismissing or absolving from the conclusions of the action *as laid*, founds a plea of *res judicata* in any subsequent action between the same parties with reference to the same subject-matter. Where, therefore, a pursuer, as a result of some unamendable defect in his pleadings or general mismanagement of his case, desires to avoid a judgment of absolvitor and to raise a fresh action against the same defender with reference to the same question in controversy, his only remedy is to abandon the action in accordance with statutory regulations. A defender may similarly, with the sanction of the Court, at any time withdraw his defences and permit decree with expenses to go against him. Thus in one case the defender of an action for the reduction of his license, being desirous of making an application for a new license, lodged a minute withdrawing his defence. The pursuer, to obstruct this move and defeat the defender's intention, declined to move for decree, but the Court allowed the minute to be received, and granted decree as craved.[1]

**The Statutory Rule.**—At any stage of the cause before an interlocutor granting absolvitor or dismissing the action is pronounced, the pursuer may offer to abandon the action by lodging a minute to that effect, signed by himself or his agent. Upon the minute being lodged and upon payment to the defender of his (taxed) expenses, the Sheriff may dismiss the action, whereupon the pursuer may bring a new action if otherwise competent. If the pursuer fails within fourteen days of the date of taxation to pay the defender's expenses, the defender becomes entitled to decree of absolvitor with expenses.[2] At common law the abandonment of an action is competent only before the record is closed, the conditions as to expenses being entirely within the discretion of the Court.[3] But even at common law the abandonment must be

[1] Owen *v.* Crichton, 1902, 10 S.L.T. 279 (O.H.); *see* Paterson *v.* Mags. of St. Andrews, 1880, 7 R. 712.

[2] Act, Rule 81.

[3] Laidlaw *v.* Smith, 1834, 12 S. 538; M'Aulay *v.* Cowe, 1873, 1 R. 307.

corroborated judicially, as by a minute tendered at the bar in the action brought to displace that abandoned.[1] Under the provisions of the Act of Sederunt of 1839, which regulated previous practice in the Sheriff Court, it was competent to the pursuer, before an interlocutor of absolvitor was pronounced, to enter on the record an abandonment of the cause on paying full expenses to the defender, and to bring a new action if otherwise competent. But under that provision abandonment of an action was competent, not at any stage but only after the closing of the record, and if the pursuer desired to abandon the cause before litiscontestation, he might do so at common law by passing from the instance and paying the defender's expenses, and if after litiscontestation (that is, after execution of the summons) by abandoning the cause and consenting to decree of absolvitor on such conditions as to expenses as the Court might see fit to impose. The common law powers were, however, completely in abeyance, because the remedy prior to litiscontestation was the same as that provided by the Act of Sederunt, and after litiscontestation the discretion of the Court as to awarding expenses was exercised at the cost of the pursuer having to submit to decree of absolvitor. After the closing of the record, however, by virtue of the provisions of the Act of Sederunt, the pursuer possessed an absolute right, subject only to payment of the defender's expenses, to abandon the action. Under the provisions of the Act of 1907, the pursuer appears to possess no absolute right of abandonment nor any higher right than to "offer to abandon" the cause, and the Sheriff is apparently entitled to exercise his discretion as to whether or not in the circumstances disclosed the desire of the pursuer shall be given effect to. The rule, it would appear, does *not* confer upon the pursuer any absolute right to abandon his action conditionally upon payment of defender's expenses.[2] Circumstances are easily conceivable in which an absolute right on the part of a pursuer to abandon an action at a late stage of the proceedings and to institute a fresh action might entail hardship if not injustice upon the defender, and in such circumstances the power of refusing to allow the abandonment of the action now conferred upon the Sheriff may be expected at least to ensure that the utmost care

[1] Nelson *v.* Gordon, 1874, 1 R. 1093; Campbell's Trs. *v.* Campbell, 1863, 1 M. 1016, *per* Ld. Deas.

[2] *See* opinion *contra* in Craw *v.* Malcolm, 1908, Sh. Ct. Reps. 268, *per* Sheriff Glegg; *and see infra*, pp. 253–5.

and precision on the part of the pursuer will be exercised in selecting a competent remedy, and in so stating his averments as to preclude the necessity for a subsequent abandonment. Under the Court of Session Act of 1868, abandonment is competent only with leave of the Judge before whom the cause depends, and provided that he is of opinion that it is just and proper in the circumstances. The provisions of the Act of 1907 assimilate in this respect, therefore, the practice of the Supreme and the Sheriff Courts. While abandonment is within the presumed mandate of counsel instructed to appear for a party,[1] an agent requires the express authority of his client to do so.[2]

**Time of Abandonment.**—The abandonment is competent at any time before an interlocutor of absolvitor or dismissal is actually pronounced. The Judicature Act of 1825 conferred upon the Court of Session no power of allowing abandonment till the record has been closed, and in the Act of Sederunt passed in 1828 to carry the provisions of the Judicature Act into effect a further limitation was imposed so as to make it incompetent for a pursuer to abandon the cause not only after actual absolvitor but after any interlocutor "leading by necessary inference" to such a decree. Neither of these limitations was in terms contained in the Act of Sederunt of 1839, nor is included in the Act of 1907; nor is the condition contained in the Court of Session Act of 1868 that abandonment is competent in the course of a trial "any time before the Judge has made avizandum with the evidence," one which applies to the Sheriff Court. Under the provisions of the Act of 1907, the pursuer may competently offer to abandon the cause any time after service of the writ and before decree is actually pronounced, that is, before the terms of the interlocutor are actually settled, even though opinions adverse to his case have been pronounced.[3] If the pursuer desires to abandon before litiscontestation takes place, that is, before the initial writ is tabled, he may do so by intimating his intention to the defender and making payment of any expenses he may have incurred. If after litiscontestation, he must do so according to the form prescribed by the Act.

[1] Duncan *v.* Salmond, 1874, 1 R. 329.

[2] Urquhart *v.* Grigor, 1857, 19 D. 855, *per* Ld. J.-C. Hope; Orr *v.* Meikle, 1867, 39 Jur. 557.

[3] Western Bank *v.* Baird, 1862, 24 D. 859.

**Mode of Abandonment.**—The mode of abandonment is by a minute stating that "the pursuer offers to abandon the cause in terms of the Act," without any qualification or reservation whatever.[1] The Act would appear to contemplate the competency of the defender objecting to the abandonment. And it would further appear to have in contemplation that the Sheriff, as is the case with the Lord Ordinary in the Court of Session, under the provisions of the Court of Session Act 1868, must be satisfied that the proposed abandonment is just and proper in the circumstances. No provision is made by the Act with regard to either matter, but probably on an offer of abandonment being lodged by pursuer, the defender might competently either crave an opportunity of being heard orally on any objections which he might consider valid, or lodge a minute by way of answer to the pursuer's offer stating his objections. In any event the use of the word "offer," which is an entire innovation upon practice both in the Court of Session and in the Sheriff Court, would appear to imply that there must be a corresponding "acceptance." Probably, if the defender either actually or tacitly and impliedly accepts the pursuer's offer, the function of the Sheriff will consist in pronouncing an interlocutor giving effect to the "contract" between the parties. If, however, the defender objects to the pursuer's "offer," it will be the duty of the Sheriff to consider the defender's objections and the whole circumstances attendant on the pursuer's intimation, and to either allow or refuse the abandonment as may be just and proper in the circumstances of the case. If the Sheriff is of opinion that the pursuer should be allowed to abandon, the Act further appears to contemplate that he should pronounce an interlocutor appointing the defender to give in an account of his expenses, remitting the account to the auditor for taxation, and ordaining the auditor to report.

**Conditions as to Expenses.**—After taxation of the defender's account of expenses and the lodging of the account with the auditor's report annexed, the pursuer must make payment of the amount as taxed. The payment of expenses is a condition precedent to the abandonment of the cause.[2] The Sheriff cannot competently pronounce an interlocutor dismissing the action in respect of the

[1] *See* Adamson *v.* Guild, 1867, 6 M. 347; Stewart *v.* Stewart, 1906, 8 F. 769.

[2] Scott *v.* Thurso River Harbour Trs., 1895, 23 R. 268; Aird *v.* Tarbert Sch. Board, 1907, S.C. 22.

pursuer's abandonment until payment of the defender's expenses has been made, though apparently under the provisions of the Act he may pronounce one from which it may be inferred that he holds the pursuer's right to abandon to be established. But even if an interlocutor, which either actually or by implication holds the action to be abandoned or affirms the pursuer's right to abandon, has been pronounced, the action nevertheless subsists until payment of the expenses has actually been made.

**Failure to pay Expenses.**—Formerly, if for any reason the pursuer failed to make payment of the defender's expenses, the original action subsisted and required to be brought to a termination in the usual way. The pursuer by his failure merely lost the privilege of abandoning the action, but the defender did not therefore become entitled to decree of absolvitor.[1] If the pursuer failed to insist in the action for a year and a day, the defender might then move for absolvitor. Under the provisions of the Act of 1907, however, if the pursuer for any reason fails to make payment of (or to consign) the defender's expenses within fourteen days from the date of taxation, the defender becomes entitled to decree of absolvitor with expenses.[2] Such a decree, of course, precludes the pursuer from raising a fresh action, since it founds a plea of *res judicata*. If the defender by his conduct obstructs a settlement, as by refusing to take payment or to grant a receipt for the amount, the pursuer may consign the amount. In the event of the pursuer thereafter raising a new action, the defender will be barred from objecting on the ground that the expenses of the former action have not been paid.[3] Expenses means "full expenses" as taxed between party and party, and such expenses probably include those awarded to the pursuer at an earlier stage of the cause and paid by the defender, to repayment of which the defender (probably) becomes entitled on the abandonment of the action by pursuer.[4]

**Interlocutor dismissing Action.**—As soon as payment of defender's expenses has been made, but not till then, the Sheriff may dismiss the action. The fact that they have been paid will be evidenced by a receipt for the amount, which must be produced to the Sheriff. Consignation of the amount will be held as the equiv-

[1] Ross *v.* Mackenzie, 1889, 16 R. 871.

[2] Act, Rule 81.

[3] Lawson *v.* Low, 1845, 7 D. 960.

[4] Stewart *v.* Stewart, 1906, 8 F. 769.

alent of payment.[1] The word "may" appears to give the Sheriff a discretion even at this stage to refuse the pursuer his abandonment, but if the account has been remitted for taxation and the amount taxed has actually been paid or consigned, there seems no room for the exercise of any discretion in the matter. But before the abandonment can be effectual it must be sustained by an order of Court,[2] and the only appropriate interlocutor is one which, "in respect the expenses due to the defender as taxed have been paid (or consigned), allows the pursuer to abandon the cause, dismisses the action and decerns, with the expenses of extract." A decree of absolvitor would be manifestly improper; but if such an interlocutor be pronounced through error or *per incuriam*, the pursuer would not thereby be barred from raising a new action.[3] Before the interlocutor dismissing the action is pronounced, there seems nothing in the terms of the Act or otherwise to prevent the pursuer withdrawing his minute of abandonment, upon such conditions as to expenses as the Sheriff may deem just.[4]

**Partial Abandonment.**—It has not been decided whether it is competent to abandon a part of the action. After decree disposing of part of the conclusions, it would appear quite competent for the pursuer to abandon the remainder, as that remainder would constitute the whole question in controversy before the Court. But whether a pursuer can abandon a part of his action, proceed with the remainder, and ultimately raise a new action dealing with the part abandoned, has not been the subject of express decision under the rules regulating the procedure either in the Court of Session or the Sheriff Court prior to the passing of the Act of 1907. The terms of the rule of that Act would not, however, appear to be such as to lend countenance to the view that such a proceeding would be now competent. The Act appears to contemplate the abandonment of the action as a *unum quid*.

**Effect of Abandonment.**—The effect of the abandonment is to enable the pursuer to raise a fresh action against the same defender with reference to the same subject-matter. But before the pursuer can raise the new action the interlocutor dismissing the

[1] Lawson *v.* Low, 1845, 7 D. 960.

[2] Cormack *v.* Waters, 1846, 8 D. 889; Muir *v.* Barr, 1849, 11 D. 487.

[3] Stewart *v.* Greenock Harbour Trs., 1868, 6 M. 954, *per* L. Deas.

[4] Todd *v.* Glasgow Corpr., 1879, 16 S.L.R. 718; Dalgleish *v.* Mitchell, 1886, 23 S.L.R. 552; Lee *v.* Pollock's Trs., 1906, 8 F. 857.

original action must have been pronounced. In one case it was held that a new action was incompetent because the summons was served on the day before the decree fixing expenses was pronounced in the abandoned action, and that even the acceptance of those expenses did not preclude the defender from stating this plea.[1]

**Disclaiming Action.**—Abandonment is the only mode by which a pursuer who has authorised the institution of proceedings in his name can withdraw from the action. But any party to a suit, whether as pursuer, defender, claimant, or otherwise, for whom appearance has been made without his authority, can withdraw from the action by lodging a minute of disclamation, to which the Court, if satisfied that such appearance has been unauthorised, will interpone authority. A party cannot disclaim an action if he has given the agent a general mandate to carry on actions in his name.[2] An agent who acts without authority is liable in expenses both to the opposite party and also to the person for whom he acts,[3] but the opposite party must prove the absence of authority before he can recover his expenses from the agent so acting.[4] Failure to produce authority when required to do so has been held equivalent to proof.[5]

**Abandonment where Counter-claim stated.**—Under the provisions of the Act of 1907, where a defender pleads a counter-claim, it is sufficient that he state it in his defences, with the result that the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may consequently grant decree for it in whole or in part, or for the difference between it and the claim sued on.[6] This provision, it may be noted, in the first place, does not in any way absolve the defender from the necessity of making a separate statement of facts in support of his counter-claim, and of separating his substantive claim from his answer to that of the pursuer.[7] Nor does the Act apparently alter the conditions under which a counter-claim may be competently pleaded; in other words, it does not appear to make competent a defence which was under previous practice incompetent. The object of the rule appears to be

[1] Aitken *v.* Dick, 1863, 1 M. 1038; *see* Kennedy *v.* Macdonald, 1876, 3 R. 813.

[2] Pitcairn *v.* Pitcairn's Trs., 1834, 12 S. 769; Sanderson *v.* Campbell, 1833, 11 S. 623.

[3] Cowan *v.* Farnie, 1836, 14 S. 634.

[4] Noble *v.* Mags. of Inverness, 1825, 3 S. 358.

[5] Philip *v.* Gordon, 1848, 11 D. 175.

[6] Act, Rule 55.

[7] Act, Rule 46.

merely to remove an obstacle, hitherto existent, which prevented a defender who had established a ground of claim against the pursuer from obtaining a decree in respect of his claim in addition to findings in his favour in respect to the claim made against him. The pursuer may, however, as has been seen, offer to abandon his action against the defender at any stage of the cause, and the Sheriff may, if he sees fit, dismiss the action on condition that the pursuer pays or consigns the amount of the defender's expenses; if the expenses be not forthwith paid, the defender becomes entitled to decree of absolvitor, with expenses. The Act, however, makes no provision for the case of a pursuer offering to abandon his action when at the same time the defender states a counter-claim. Some questions of great nicety are raised by the absence of such provision. Does the disposal of the pursuer's case by his abandonment of it necessarily involve the disposal of his answer to the defender's counter-claim? Does the abandonment of the pursuer's claim preclude the defender from going on with his counter-claim? It may be conceded that if the pursuer possessed an absolute right of abandonment, unhampered by any discretion on the part either of the Sheriff or of the defender to refuse his "offer," the matter would present some almost insuperable difficulties. It would certainly appear to be plainly unreasonable that if the pursuer abandons his action on payment of the defender's expenses (a course which would entitle him to raise a fresh action relating to the same subject-matter against the defender), the defender should nevertheless be entitled to insist on decree for his counter-claim against the pursuer, since by obtaining such a decree the defender would almost necessarily render the pursuer's reservation to raise a fresh action against him practically worthless, such a decree being to all intents and purposes *res judicata* against the pursuer. Further, the defender, by enforcing his decree against the pursuer, would necessarily deprive the pursuer of any remedy which otherwise he might have had. And if the defender's expenses be not paid, it must be remembered that a still heavier penalty is exacted from the pursuer, in respect that defender then becomes entitled to a decree of absolvitor. If the pursuer therefore possessed an absolute right to abandon his action, and after abandoning it failed to pay defender's expenses, the defender would not only be altogether freed from the demand made against him by the pursuer, but by obtaining decree against him for

the amount of his counter-claim, would be placed in a position of a pursuer who not only establishes his own claim but negatives that of his opponent, and that, too, without any discussion on the merits of either claim. But for the provision of the rule as to the statement of a counter-claim, the only course open to a defender would be to raise a substantive action for the amount of his counter-claim. Such an action would not, of course, be affected in any way by the abandonment of his action by the pursuer. The difficulty in the matter is, however, created by the fact that the rule provides that the Sheriff may (not apparently must) deal with a counter-claim as if it had been stated in a substantive action, and wholly fails to make any provision for dealing with a counter-claim where it is not dealt with by the Sheriff as though stated in a substantive action.

These difficulties seem, however, to disappear when it is perceived that Rule 81 of the Act gives a pursuer a right, not of absolute abandonment, but merely to offer to abandon, an offer which it is in the discretion of the Sheriff (or it may be the defender) to refuse. In that case it would seem that where in an action a counter-claim is made, the abandonment will be permitted not as an absolute right, but in the discretion of the Sheriff as may appear to him to be just. He may therefore, in face of a counter-claim which is insisted in by the defender, refuse to allow the pursuer to abandon, and allow the defender to prove his counter-claim in the usual way.[1]

## II. Compromise of Action

The parties to a litigation may settle or compromise the action without awaiting the decision of the Judge. An agent does not possess the power to compromise or settle an action without the express authority of his client, and if he do so he may be liable in damages.[2] The compromise or settlement of an action may take place extra-judicially or judicially. Where parties settle or compromise extra-judicially, the terms of settlement may be embodied in a joint minute in accordance with which the Court will grant decree, or they may by joint minute crave that the action may be dismissed without disclosing the actual terms of compromise. In

[1] *See* Craw *v.* Malcolm, *supra*, in which a different construction of the Act appears to have been made.

[2] Cormic *v.* Grigor, 1862, 24 D. 985.

either event the settlement or compromise will be effectual without the interposition of the Court. Thus it was held that an action had been effectually settled by the pursuer's accepting an inadequate sum from the defender, who had approached him behind his agent's back, and that on the pursuer repudiating the settlement the Sheriff had rightly allowed a proof of the defender's averments as to the receipt.[1] In another case the defender had made a judicial tender of £50, of which the pursuer, a working man, was in ignorance. The parties met, and in the course of conversation pursuer agreed to take £20 in settlement of his claim,—the money being thereupon paid and a receipt given. In an action for the reduction of the discharge, in which pursuer averred that the fact that a tender had been made was concealed from him, that advantage of his ignorance had been purposely taken, and that he took the £20 on the understanding that it was to be a clear payment exclusive of expenses, it was held that in face of the actual receipt these averments were irrelevant, and that the parties had effectually settled the action extra-judicially.[2] And an extra-judicial settlement may be effected by the parties even though they are at variance as to the precise meaning of its terms.[3] Thus. where informal writings, neither holograph nor tested, passed between the agents of the parties in an action relating to heritage, in which certain prior oral arrangements were confirmed, it was held that though the action related to heritage it might be compromised by informal writings, and that the writings, though they did not set out the terms of the agreement as to the precise terms of which the parties were at variance, were so far binding as to terminate the action.[4] Where a pursuer sues two or more defenders conjunctly and severally or severally, he does not, by effecting a settlement or compromise with one or more of their number, liberate the others or bar himself from continuing the action against them.[5]

The action may be settled judically by the defender lodging a minute of tender. If the tender is accepted by the pursuer, the Court interpones authority and grants decree in accordance with its terms.[6]

[1] Gow *v.* Henry, 1899, 2 F. 48.
[2] Welsh *v.* Cousin, 1899, 2 F. 277.
[3] Christie *v.* Fife Coal Co., 1899, 2 F. 192.
[4] Anderson *v.* Dick, 1901, 4 F. 68.
[5] Douglas *v.* Hogarth, 1901, 4 F. 148.
[6] *See* Expenses, "Tender," *infra.*

## III. Sisting Process

When both parties to a cause, or either of them, desire to have the action delayed until the occurrence of some event which will enable it to be brought more summarily or effectually to a conclusion, or until some particular proceeding has been taken or decision pronounced which will supersede or materially affect the result of the action, and which it is therefore desirable to await, the proper course is to move that the action be sisted meanwhile. It is always in the discretion of the Court to sist or refuse to sist process, and as the exercise of this discretion depends largely on the circumstances connected with each particular case, few general rules on the subject can be stated. It may, however, be stated generally that a sist of process will not be granted unless the expediency of such a course be clearly apparent.

While there is no class of action in which a sist of process is absolutely incompetent, the kind of action in which it is most frequently sought is one containing petitory conclusions which a pursuer has raised before completion of his necessary title to sue, or before taking some preliminary step which is imperative before his action can be successful. But where a disposition, forming part of the pursuer's title in an action of reduction, had been accidentally destroyed, process was sisted to enable an action of proving its tenor to be brought.[1] When the defender of an action lodged in process a document said to be a discharge of the pursuer's claim, the Lord Ordinary sisted process to enable the pursuer to bring an action of reduction of the alleged discharge.[2] And where creditors of a husband, having arrested the rents of the wife's property, brought a furthcoming, the Court refused in that action to decide whether the rents were liable for the husband's debts, but sisted process to enable the pursuer to institute competent proceedings to determine the question of the husband's liability.[3] So an action for payment of extras under a contract to which a decree-arbitral was pleaded as a defence, was sisted to allow an action of reduction of the decree-arbitral to be brought.[4]

[1] Officers of Ordnance *v.* M'Donald, 1825, 3 S. 442.

[2] Maclean *v.* Hassard, 1902, 10 S.L.T. 67 (O.H.); *see* E. of Lauderdale *v.* Wedderburn, 1903, 11 S.L.T. 110 (O.H.).

[3] Loudon *v.* Young, 1856, 18 D. 856.

[4] Birrel *v.* Dundee Gaol Comrs., 1856, 29 Jur. 56.

The second class of cases in which a sist of process is convenient or necessary is that in which the pursuer raises his action in circumstances in which he ought to have waited for the completion of proceedings already in dependence, or where there are actions actually pending, the decision in which will either supersede or materially affect the question in which he is interested. Thus, while a suspension and reduction of a decree-arbitral, on the ground of bribery and corruption, was in dependence, the arbiter raised an action of damages for defamation in respect of certain averments contained in that action, and the Court sisted the action by the arbiter *hoc statu*;[1] and an action concluding for payment against several defenders, the amount of whose liability depended on the issue of an action of relief *inter se*, was sisted till the issue of the latter action.[2] When, under a contract containing a clause referring questions as to the execution of the work to an arbiter, a contractor sued his employer for a lump sum in respect of work done and damages for breach of contract, the Court sisted the action to await the award of the arbiter, on the ground that upon the arbiter's determination as to how the work was executed would depend the defender's liability for damages for breach of the contract.[3] Again, where a father presented a petition for custody of his children, and subsequently raised an action of divorce against his wife concluding for custody, the petition was sisted pending the result of the action of divorce.[4] Where a foreign Court appears to be the more appropriate tribunal for deciding the questions raised, and in particular if the foreign action was the first to be raised, the Court will sist process, or in certain cases even decline to exercise jurisdiction. Thus, in a case with reference to a contract which contained a clause of arbitration, which in terms of the contract fell to be determined according to English law, the Court sisted procedure to await the decision of the English Courts with reference to the validity of the clause.[5] But in an action of damages by the widow of a shipmaster who was drowned through a collision, against the owners of the vessel responsible for the collision for damages for the loss of her husband, the defenders moved for a sist of process

[1] Girdwood *v.* Hercules Insce. Co., 1833, 11 S. 351.

[2] MacRitchies and Murray *v.* Young, 1827, 5 S. 226; Smellie v. Thomson, 1868, 6 M. 1024.

[3] Barr *v.* Queensferry Comrs., 1899, 1 F. 630; *see* Wilson and Macfarlane *v.* Stewart & Co., 1898, 25 R. 655.

[4] Paterson *v.* Paterson, 1899, 2 F. 81.

[5] Robertson *v.* Brandes, Schönwald, & Co., 1906, 8 F. 815.

*hoc statu*, founding on an order obtained by them in the English Admiralty Court that "all proceedings in actions pending, except for the purpose of assessing damages in such actions, be stayed," but the Court refused the motion, holding that the order did not apply to the action, although no decree upon which diligence could proceed would be therein pronounced.[1]

In certain cases an action may be sisted to enable the defender to bring an action to constitute some defence which he is not allowed to plead by way of exception. The sist must not, however, be granted under circumstances such as to give the defender a benefit to which he would not otherwise be entitled. It is, for example, incompetent to sist an action for a liquid claim till an action by which an illiquid counter-claim may be constituted has been brought.[2] Thus, in a case in which a pursuer obtained a finding by the Court that defender was due him a sum of £300, the defender raised an action to constitute a claim which he had vainly attempted to set-off by way of compensation in the original action. On the pursuer moving for decree for the sum awarded him, the defender moved that the action be sisted to await the result of the second action, but the Court refused the motion.[3] If, however, the action to constitute the counter-claim be almost completed, the Sheriff has a discretion to sist the original action for a short period, on the principle that a claim which is capable of being instantly made liquid may be held to be already liquid. Thus, where an action of accounting against a legatee had been brought and was almost ripe for decision, an action at his instance for payment of the legacy was sisted until the action of accounting should be disposed of.[4] But where a railway company sued a trader for the carriage of goods and the trader claimed a reduction on account of waggon allowances, the Court refused to sist the action at the company's instance to await an award by an arbiter as to the sum to be allowed as rebate, on the ground that there had been undue delay on the part of the trader to liquidate his claim, leaving it open to him to raise a new summons.[5]

[1] Leadbetter *v.* Dublin and Glasgow S. P. Co., 1907, 14 S.L.T. 768.

[2] Johnstone *v.* Robertson, 1861, 23 D. 646; MacBride *v.* Hamilton, 1875, 2 R. 775.

[3] Mackie *v.* Mackie, 1897, 5 S.L.T. 57 (O.H.).

[4] Munro *v.* Macdonald's Exrs., 1866, 4 M. 687.

[5] N. B. Rly. Co. *v.* N. B. Grain Storage Co., 1897, 24 R. 687.

**Sisting to have Document Stamped.**—Where either party founds upon a document which is objected to on the ground of its wanting the necessary stamp, the action was formerly sisted to enable the proper stamp to be affixed. The party against whom the objection is taken may now, under the provisions of the Stamp Act of 1870, obviate the necessity for a sist of process by paying to the Clerk of Court, any time before the conclusion of the trial or proceeding, such sum as the Sheriff may certify as the amount of the stamp duty, or of additional stamp duty, along with the penalty required by statute and an additional penalty of £1. The objection that a document founded on is not appropriately stamped is one which cannot be waived or evaded by the parties, and a deed which is awanting in such a particular cannot be even looked at by the Court.[1] The cost of stamping must in the first place be borne by the party founding on it.[2] If the deed be a bilateral one, and the party founding on it be successful, he will in dealing with the expenses *in causa*, be awarded half the cost of stamping.[3] If the document have not availed him to make out his case, and have not been one to which the other party has had occasion to refer, no part of the expense of stamping will be awarded to him.[4]

**Recall of Sist.**—The sist may, by motion to that effect, be recalled and the action revived at any time, either upon completion of the proceedings in respect of which it was granted, or on the failure of the proper party to proceed diligently with them.

### IV. Remit of Action *ob contingentiam*

In the Court of Session, where each Division and each Lord Ordinary forms a distinct Court, the proceeding known as remitting a cause *ob contingentiam* is of frequent use, by which connected actions enrolled before different judges are transferred so as to bring them before the same judge. The rules—partly statutory—under which this is done did not formerly require consideration in a work dealing solely with the procedure of the Sheriff Court, because there was no practice (however useful such a practice might have been) of remitting causes from one Sheriff Court to another; and in the

[1] Cowan *v.* Stewart, 1872, 10 M. 735.
[2] Neil *v.* Leslie, 1867, 5 M. 634.
[3] M'Douall *v.* Caird, 1870, 8 M. 1012; Wyllie & Lockhead *v.* Thames Fire Assurance Co., 1861, 23 D. 727.
[4] Hislop *v.* Thomson, 1878, 5 R. 794.

Sheriff Courts where there is more than one judge, the rolls are kept apart for convenience only, and causes may be transferred from one judge to another at the discretion of the Sheriff.[1] The Act of 1907, while it does not contain any provision dealing in terms with the subject, seems to contemplate the occurrence of the necessity or the convenience of remitting a cause from one Sheriff Court to another on the ground of contingency, as for the first time it confers on the Sheriff the power of so doing in cases in which such a course may be deemed advisable or proper. The Act confers upon the Sheriff, upon sufficient cause, and by interlocutor stating his reasons, the power to remit *any* cause to another Sheriffdom, such interlocutor, when issued by a Sheriff-Substitute being appealable, with his leave, to the Sheriff (but no further) within seven days.[2] The power thus conferred is entirely novel, since the similar though narrower and more restricted power conferred by section 46 of the Act of 1876 applied only to the case of a defender called in the Sheriffdom of his place of business. As there are no statutory rules on the subject, and as it may be presumed one of the intentions of the Legislature in passing the Act was, so far as may be possible and convenient to assimilate the practice and procedure of the Court of Session and of the Sheriff Court, it may further be assumed that the rules which govern practice in the Supreme Court will, *mutatis mutandis* and so far as applicable, apply to the procedure in the Sheriff Court. Proceeding on this assumption the following rules would seem to apply :—

**When Remit Competent.**—Where any action, matter, process, complaint, or cause has been brought before the Sheriff of a county, any other Sheriff may remit any action, process, complaint, or cause subsequently brought before him relating to the same subject-matter or thing, or having a connection or contingency therewith, to the consideration of the Sheriff before whom the first cause, action, process, complaint, or matter had been previously brought.[3] In the Court of Session the provisions of the Act are imperative, and if there appears to be contingency between two actions, as to which the decision rests with the Judge before whom the motion to remit is made, there is no discretion permissible to the Court. Although the provision of the Act of 1907 is not so expressed, it may perhaps be inferred that

[1] Dove Wilson, p. 256.
[2] Act, Rule 20.
[3] 48 Geo. III. c. 151, s. 9.

such a remit is intended to be made upon the motion of one or both of the parties. There is, however, nothing in the terms of the rule to preclude the exercise of the power by the Sheriff *ex proprio motu*, though, equally, there is nothing which makes it compulsory. The Sheriff has therefore a discretion in all cases to remit or refuse to remit a cause *ob contingentiam*, according to the balance of convenience to the parties. The motion for a remit may be made at any time so long as the cause depends.[1] There cannot, however, be a remit where the prior cause has ceased to depend by extract of final decree or dismissal or in any other way. So long, however, as the prior cause remains a pending process, as where extract is superseded, a remit *ob contingentiam* is competent.[2]

**What constitutes Contingency.**—It is impossible to lay down any hard-and-fast rule as to what constitutes contingency, and the matter is one entirely within the discretion of the Sheriff, to be exercised according to the circumstances of each particular case. In the Court of Session the following cases have been held to fall within the operation of the rule: counter actions of divorce;[3] a count and reckoning against a curator and a petition for his exoneration;[4] an action in which decree for expenses had been taken in the agent's name, and a suspension and liberation by the unsuccessful party against the agent in respect of irregularities in the extract decree;[5] a suspension of diligence on a small debt decree and a suspension of the decree itself on the merits;[6] and actions of count and reckoning with reference to the same trust estate.[7] On the other hand, there has been held to be no contingency between an action of proving of the tenor of a deed and one to which the proving of the tenor was incidental;[8] an action by an agent for his account in the conduct of a suit, and the suit in which the account sued for was incurred;[9] and actions arising out of the same bankruptcy, but between different parties and based on different grounds and with different objects, although the same matters of fact might have to be investigated.[10] While generally there can be no contingency between two actions unless a

[1] Bryce *v.* Chalmers, 1859, 22 D. 213.
[2] Gordon *v.* Ross, 1827, 6 S. 257.
[3] Powrie *v.* Powrie, 1868, 6 M. 1111.
[4] Gordon *v.* Ross, *sup.*
[5] Cleland *v.* Clason & Clark, 1850, 7 Bell's App. 153.
[6] Jaffray *v.* Gordon, 1830, 8 S. 803.
[7] Reid's Trs. *v.* Reid, 1873, 45 Jur. 191.
[8] Sutherland *v.* Fraser's Trs., 1824, 3 S. 215.
[9] Landale *v.* Tod, 1831, 9 S. 268.
[10] Liqurs.of Western Bank *v.*Douglas, 1860, 22 D. 447.

decision in one would decide wholly or partially the question in controversy in the other,[1] and while the fact that the actions are between different parties, though not in itself conclusive, forms an important element in the consideration,[2] the real criterion in deciding whether or not two actions are contingent is, not necessarily that the actions are between the same parties, but that the question in controversy in each is the same, or at least that there exists between the actions such a close and intimate connection and interdependence as to make it convenient, proper, or expedient that the Judge who decides the one shall also decide the other.

**The Interlocutor remitting** a cause under the provisions of the rule must state the Sheriff's reasons.

**Appeal.**—Where a cause is remitted by a Sheriff-Substitute to another Sheriffdom under the provisions of the rule, there is an appeal to the Sheriff within seven days. The Sheriff's judgment is, however, final and cannot be reviewed by the Court of Session. As in the rule Sheriff includes both Sheriff-Substitute and Sheriff, the latter may competently remit where the Sheriff-Substitute has not done so, but in the event of his doing so there is no appeal from his judgment.

**Remit to Court of Session.**—While the Sheriff may competently remit a cause to another Sheriffdom, he has no power to remit to the Court of Session. But the same result may be otherwise attained. Where a contingency exists between a cause depending in the Court of Session and another in the Sheriff Court, a party desirous of removing the latter to the Court of Session may lay before the Lord Ordinary or the Division before which such cause depends, a copy of the Sheriff Court record, or of such pleadings as may have been lodged and of the interlocutors in the cause certified by the Sheriff-Clerk, and may move for the transmission of the Sheriff Court process. If the Court is of opinion that there is contingency between the causes, it grants warrant for the transmission of the process. The decision of the Lord Ordinary or of the Court, as the case may be, upon any such motion is final at that stage, though in the event of the application being refused it is competent for either party to renew the motion at any sub-

[1] Robertson *v.* D. of Atholl, 1869, 8 M. 305, *per* Ld. J.-C. Moncreiff.

[2] Cuthbertson *v.* Young, 1851, 13 D. 1308.

sequent stage of the cause.[1] The provisions of the section are peremptory. A plea of *lis alibi pendens* stated in the Court of Session with reference to an action depending in the Sheriff Court will be repelled, and the Sheriff Court process will be remitted *ob contingentiam*.[2] The motion is competent at any stage before decree has been pronounced in the Sheriff Court.

## V. Conjoining Actions

Where the connection between different actions depending before the same judge is so intimate and close that they can best be investigated and determined together, as where the controversy is between the same parties with reference to the same subject-matter, it is proper and desirable, to save trouble and expense, that they should be conjoined. The effect of such conjunction is that they become one process, any step of procedure thereafter affecting both equally. The conjunction may be effected on the motion of either party, but the decision of the question whether two or more processes should be conjoined rests entirely in the discretion of the Sheriff, to be exercised according to the circumstances disclosed in each particular case. Conjunction will not therefore in any circumstances be granted until the Sheriff has had an opportunity of seeing and considering the nature of the cases and the pleadings of the parties.[3] The motion for conjunction may be refused on motives of expediency, as for instance where it may result in a balance of convenience to sist one action and proceed with the other.[4]

**Where Parties the same.**—If the parties are the same, and the questions in controversy between the actions are connected, even although that connection be not very intimate or close, there is so obvious a convenience in having the actions tried together, that the Court will be readily disposed to grant the motion for conjunction of the processes. If the subject-matter of the actions be not identical, there must, however, be some obvious advantage to be gained by the conjunction, as by the shortening or simplifying

[1] Court of Session Act, 1868, ss. 74, 75.

[2] Wilson *v.* Junor, 1907, 15 S.L.T. 182 (O.H.); *see* M'Fadyen *v.* United Alkali Co., 1897, 4 S.L.T. 443 (O.H.).

[3] M'Leay *v.* Rose, 1826, 4 S. 486.

[4] D. of Buccleuch *v.* Cowan, 1866, 4 M. 480; *affd.* 1876, 4 R (H.L.) 14.

the investigation of the matters in dispute or the settlement of the question in controversy, with the consequent saving of trouble and expense to the parties. But the conjunction will not be granted where it will result in prejudice to one of the parties, as where its effect would be to give one party the benefit with regard to the whole of certain pleas stated in one action but omitted in the other,[1] or to give one party the benefit of a plea of compensation to which he is not entitled.[2]

**Where Parties different.**—Even although the parties to the actions are not identical, provided that substantially the same issue is raised between parties having the same interest, conjunction is both competent and expedient if the result is likely to conduce to a balance of convenience, as by making one record or one proof serve for all. Thus, in an action with reference to pollution between riparian proprietors and millowners on the same stream, it was laid down that "while it is always a question of discretion, supposing there is a natural connection between the two processes, whether they ought to be conjoined, they may be so complicated, and there may be such shades of distinction between the questions they raise, that confusion, perplexity, and embarrassment may be produced by conjoining them or trying them together; and, of course, if there be any prospect of that, the Court will never do it. But if that is not so, if they raise one issue, if the same issue will try both causes, then it is expedient that that issue should be tried once for all in the two processes, and that for that purpose the processes should be conjoined."[3] Thus actions were conjoined where different pursuers were making the same demand on the defender.[4] Where five separate actions of damages were raised by the owners and representatives of a fishing boat which was sunk by a collision with a steamer against the owners of the steamer, the pursuers in all cases being represented by the same agent and counsel, the Court, on the motion of the defenders, conjoined the actions, though the pursuers all united in opposing the motion on the ground that conjunction would cause inconvenience and prejudice to them.[5] Actions have also been conjoined where the same pursuer sued

[1] Nat. Exchange Co. *v.* Drew & Dick, 1861, 23 D. 1278.

[2] M'Leay *v.* Rose, *sup.*

[3] D. of Buccleuch *v.* Cowan, *sup.*, *per* Ld. J.-C. Inglis.

[4] Lindsay *v.* Chapman, 1826, 4 S. 490.

[5] Gatt *v.* Angus Shipping Co., 1907, 14 S.L.T. 749 (O.H.).

different defenders with regard to the same subject-matter.[1] In the same way counter actions may be conjoined, though the parties may not be identical, where the same question in controversy is involved and it is desirable to have all parties in the field while settling one of them, as, for instance, where an action to reduce a deed and one of declarator of its validity depend together,[2] or where a person brings an action for reduction of a decree-arbitral by arbiters named in a deed of voluntary separation and at the same time an action of adherence.[3] On the other hand, conjunction has been refused where the one action raised a question of the right of relief of a defender against a third party in respect of the debt or claim which was the subject of the other action, since though both actions, in a sense, related to the same matter, the issue raised in each was different, the defender's liability in the first action depending upon quite different considerations from his right to relief in the second.[4] Similarly, conjunction will be refused even where the actions are between the same parties and relate to the same subject-matter, if the precise issue in the two actions differs.[5]

**Parties and Subject-matter different.** — If neither the parties nor the question in controversy between them is the same, though in regard to these particulars there may be a close connection, conjunction will be refused, since the difficulties inherent in keeping separate the matters pertaining to each individual action in such cases more than counterbalance any advantage which may be gained by having a joint inquiry.[6]

**Time of Conjoining.**—Both actions must be pending before the same Judge at the time when the motion for conjunction is made. It is desirable, though not absolutely necessary, that the two actions should be at the same stage, and if possible before the closing of the record. It is always a consideration in favour of refusing a motion for conjunction, that one action is far in advance of the other, and in such cases the Court may, instead of conjoining the actions, sist one till the other is ready. After a proof has been taken in one of the actions and not in the other, only very special circumstances will conduce to the advisability of conjunction, and

[1] D. of Buccleuch *v.* Cowan, *sup.*

[2] M'Dowall *v.* Campbell, 1838, 16 S. 629.

[3] Shand *v.* Shand, 1832, 10 S. 384.

[4] Grey *v.* Kerr, 1837, 15 S. 494; Mackay *v.* Greenhill, 1858, 20 D. 1251.

[5] Nat. Exchange Co. *v.* Dick, *sup.*

[6] Western Bank *v.* Douglas, 1860, 22 D. 447.

where a verdict had been given in one action before the motion for conjunction was made in the other, it was refused.[1]

**Mode and Effect of Conjunction.**—Actions are conjoined by interlocutors to that effect in each action. After conjunction all steps of procedure apply equally to each of the actions, the interlocutors being written on the interlocutor sheet of the principal action, or upon a new interlocutor sheet applicable to the conjoined actions. Unless the parties expressly consent or the judge so orders, all steps taken in the separate actions before conjunction remain applicable only to the particular action in which they have been taken, and in disposing of the conjoined actions all conclusions should be specially disposed of, so as distinctly to show what has been done in each action.

**Disjoining Actions.**—Actions which have been conjoined may be disjoined at any time, as, for example, where it turns out that it would be advantageous to try one before the other.[2] Where conjoined actions have a joint record, it may, on their being subsequently disjoined, remain the record in the leading action, a new record being made up in the other.

[1] Dunn *v.* Merry, 1832, 10 S. 555.

[2] Turner *v.* Tunnock's Tr., 1864, 2 M. 509.

# CHAPTER XX

## PROCEDURE INCIDENTAL TO PROOF

### I. Recovery of Documents


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### I. Recovery of Documents

As has been seen, documents which are founded upon in the pleadings of the parties should be produced before the record is closed, and each party must, if required by any other party or by the Sheriff, lodge any documents which he founds upon, so far as they may be within his custody or power, either along with his pleadings or at latest before the closing of the record. Where such documents are not produced by either party, or where they are in the hands of third parties, the Sheriff may, on the motion of either party, grant a diligence for their recovery, and he may on that

account delay closing the record.[1] But documents which a party deems to be material to his case, and which are not founded upon in the pleadings, may be recovered by diligence at any time after a proof has been allowed.

**The Statutory Rule.**—At any time after a proof has been allowed, or an order made for jury trial, the Sheriff, upon the motion of either party, may grant commission and diligence for the recovery of such documents as the Sheriff shall deem relevant to the case.[2] An interlocutor granting diligence against havers for the recovery of documents contained in a specification cannot be appealed without leave,[3] even if the defender's agent expresses his willingness to waive the question of the competency of the appeal.[4] As has been seen, even documents, which are founded upon in the pleadings require to be produced at the time when the pleadings are lodged or before the closing of the record, only when their production is called for by a party to the process or is ordered by the Sheriff. If, therefore, such documents are neither called for nor ordered before the closing of the record, they need not be produced until their production becomes necessary. The rule now under consideration therefore covers the case both of documents founded upon in the pleadings, production of which has not previously been required, and of documents the necessity for which becomes apparent only in anticipation of the proof. The terminology of the rule which permits the Sheriff to grant a diligence to recover only such documents as he may deem relevant to the cause, is somewhat confusing, if not misleading. The practice in the Supreme Court is that a diligence is granted to recover any document which is *prima facie* pertinent to the proof. There is no rule that documents called for in a specification must be clearly admissible as evidence; the rule is that diligence will be refused if it can be shown that such documents cannot be evidence.[5] The rule obviously, therefore, cannot be construed as meaning that before the Sheriff grants a diligence for the recovery of a document he must be satisfied that it is clearly admissible as evidence, but only that before granting the diligence he must satisfy himself that it is "relevant" in the sense of being

[1] Act, Rules 47, 48; *see supra*, p. 163.

[2] Act, Rule 62.

[3] Stewart *v.* Kennedy, 1890, 17 R. 755.

[4] Burn's Trs. *v.* Waddell & Son, 1897, 24 R. 325.

[5] Sleigh *v.* Glasgow & Transvaal Options Ld., 1903, 5 F. 332, *per* Ld. Kinnear.

"*prima facie* pertinent" to the proof. The Sheriff will not therefore at this stage consider minutely whether the document is competent as evidence or not, and the fact that he grants the diligence will not in any way determine that question.[1] If, however, he is satisfied that the document called for is wholly inadmissible as evidence, his duty is to refuse to grant a diligence for its recovery.[2] The rule is well illustrated in a case in which the defenders in an action of damages for judicial slander, while they did not take an issue of *veritas*, moved for a diligence for the recovery of the business books of the pursuer. The Court granted the diligence as being *ex facie* relevant on the question of damages, but intimated that the evidence so recovered could not be used in justification of the statements complained against.[3] The rule may therefore be stated to be that generally a party is entitled to a diligence for the recovery of all documents and writings which are *prima facie* pertinent to the issue between the parties, which are not clearly inadmissible as evidence, and which afford the proper and primary evidence of the facts which it is sought to establish by their production. The rule is subject to the corollary that diligence will not be granted for the recovery of documents which, though admissible, cannot *de facto* be put in evidence, as where in a jury trial in the Court of Session a diligence was craved within eight days of the trial.[4] Whether or not a person is entitled to recover documents in anticipation of a proof depends upon the terms of the interlocutor by which a proof is allowed. Thus, when an interlocutor has been pronounced allowing parties a general proof of their averments, a diligence for the recovery of documents must be allowed on the assumption that *all* the averments so remitted are relevant.[5] But when an interlocutor allows the pursuer a proof of his averments and the defender only a conjunct probation, the scope of the inquiry is limited by the terms of the interlocutor, and the defender will not be entitled to recover under a diligence documents which would be evidence only of his averment in defence.[6]

[1] Livingstone *v.* Dinwoodie, 1860, 22 D. 1333, *per* Ld. J.-C. Inglis.

[2] Livingstone *v.* Dinwoodie, *sup.*; M'Alister *v.* Brown, 1870, 8 S.L.R. 502.

[3] Aitchison & Sons *v.* M'Ewan, 1902, 5 F. 303.

[4] Sleigh *v.* Glasgow & Transvaal Options Co. Ld., 1903, 5 F. 332.

[5] D. of Hamilton's Trs. *v.* Woodside, 1897, 24 R. 294; M'Neill *v.* Kinneil Cannel & Coke Co., 1898, 25 R. 962; Brown *v.* Evered, 1904, 12 S.L.T. 121 (O.H.)

[6] Scott *v.* Forrest & Turnbull, 1897, 24 R. 877.

**Documents recoverable.**—What constitutes the admissibility of a document belongs to the region of the general admissibility of evidence, which is outside the scope of the present volume. In general, however, the best evidence which in the circumstances can be obtained must be adduced. Thus letters written but not sent, the diaries of living persons, the correspondence of persons who can be adduced as witnesses, and the private books of a partner demanded in order to establish a fact proveable only by the firm's writ, cannot be recovered.[1] So a diligence to recover letters written but not sent by parties who could themselves be adduced as witnesses to the facts stated in the letters, was refused, the object of the diligence, which was to cross-examine the witnesses upon the statements in the letters, being held to be an illegitimate use of diligence.[2] And where the object of the person craving the diligence is to use the documents in taking precognitions or in examining witnesses, the motion will be refused. Thus, in an action founded upon contract, a diligence was refused for the recovery of letters which passed between the partners of a firm of contractors, while those passing between the firm's workmen and the firm were not.[3] But the report of the statutory examination of a bankrupt has been allowed to be recovered at the instance of the trustee in a reduction of a deed granted by the bankrupt before bankruptcy, on the ground of fraud and insolvency, since the report of his examination might competently be used to contradict the bankrupt's oral testimony.[4]

*Business Books.*—In certain cases the diligence will be granted for the recovery of documents in order that excerpts may be taken from them of any entries which are relevant and competent evidence. Thus, while the business books both of the opposite party[5] and of third parties[6] may in general be recovered where they have a direct bearing on the points in issue, to prevent the discovery of private transactions unconnected with the question in dispute, the diligence will be limited to the taking of excerpts from them at the sight of

[1] Catto, Thomson, & Co. *v.* Thomson & Son, 1867, 6 M. 54.

[2] Livingstone *v.* Dinwoodie, *sup.*; M'Alister *v.* Brown, *sup.*

[3] Tannett, Walker, & Co. *v.* Hannay & Sons, 1873, 11 M. 932; *see* Pearson *v.* Anderson Bros., 1897, 5 S.L.T. 230 (O.H.).

[4] Emslie *v.* Alexander, 1862, 1 M. 209.

[5] Robertson *v.* E. of Dudley, 1875, 2 R. 935.

[6] Graham *v.* Sprott, 1847, 9 D. 545.

the Commissioner, the opposite party being not entitled to inspect the books for himself. In such cases it is the duty of the Commissioner to see that the books are not taken out of his custody, nor are examined by the opposite party or his agent outwith the presence of the party producing them.[1] Thus in actions of damages for personal injuries a diligence to recover the pursuer's business books and income-tax returns will in general be so limited.[2] In actions of damages for breach of promise of marriage, the opinion has been expressed that a diligence should not be granted to the pursuer to recover the business books and bank-book of the defender for the purpose of proving his financial position,[3] though in such actions it has since been held that pursuer might recover the defender's income-tax returns, his partnership contracts, and the business books of the firms with which he is connected.[4] In an action for the reduction of a will on the ground of mental incapacity, a diligence for the recovery of the books of a medical man who attended deceased was so limited.[5] In cases where fraud has been specifically averred, as by a shareholder in a bank against the directors, a general diligence has been granted. Thus in an action against the representatives of a deceased debtor of the City of Glasgow Bank for the reduction of a compromise which he had (fraudulently, it was averred) effected with the liquidator, one or two specific averments were backed up by a general averment of fraud, and the Court granted a diligence for the recovery of documents directed to establish the general averments.[6] A general diligence will not be granted for the production of the title-deeds of the opposite party, since "a party is not entitled to ransack his opponent's charter-chest in order to find grounds for his own haphazard statements."[7] But they may be recovered if there is a specific question for the decision of which their examination is necessary. Nor can the title-deeds of a third party be recovered under a diligence. If a party has a legal

[1] Cassils & Co. *v.* Absolon, 1907, 15 S.L.T. 48 (O.H.).

[2] Craig *v.* N. B. Rly., 1888, 15 R. 808; British Publishing Co. *v.* Hedderwick & Sons, 1892, 19 R. 1008; Christie *v.* Craik, 1900, 2 F. 380; Shaw *v.* Kay, 1904, 12 S.L.T. 359, 429, and 495 (O.H.).

[3] Somerville *v.* Thomson, 1896, 23 R. 576, *per* Ld. Young.

[4] Stroyan *v.* M'Whirter, 1901, 9 S.L.T. 202 (O.H.).

[5] Fraser *v.* Fraser's Trs., 1897, 4 S.L.T. 326 (O.H.).

[6] Assets Co. *v.* Shirres' Trs., 1897, 24 R. 418.

[7] *See* Dickson on Evidence, ss. 1371–3; The Admiralty *v.* Aberdeen Steam Trawling Co., 1909, 1 S.L.T. 1.

right to exhibition of such documents, he must establish it by an appropriate action.[1]

*Government and Official Documents.*—Books or documents in public Government offices and communications between Government and its officers cannot be recovered, if the responsible head of a department, or a person whose official position is such as to warrant the inference that his objection is that of his department, declares that their exhibition or production would be prejudicial or detrimental to the public service, though if the objection be not taken by the department it cannot be taken by the opposite party. Thus, while receipts for income-tax paid may competently be recovered,[2] the income-tax returns made by a party to the Inland Revenue cannot be recovered if that department objects.[3] And a diligence to recover telegrams, postal-orders, and the like cannot be enforced against the wish of the Post Office authorities.[4] Unless the Lord Advocate declares that such disclosure would be prejudicial to the public interest, he is bound, except in cases for treason and those against the Revenue laws, to disclose the name of an informer, and to produce communications passing between such person and an official under him. Thus, in an action of damages for slander on the ground that a money-lender made a complaint to the procurator-fiscal against his clerk for the alleged theft of certain letters, communications which passed between the defender and the procurator-fiscal having relation to the complaint made by the defender were allowed to be recovered, on the special ground that intimation had been given to the Lord Advocate, who had adjusted the article and did not object. But the diligence was refused with reference to the charge-books and notes of the Procurator-Fiscal, that entries dealing with the complaint might be taken, to the precognition taken of the defender by the procurator-fiscal, and to letters passing between the pursuer and the defender or his clients.[5] The Inland Revenue are entitled to refuse production of documents communicated to them by an informer,[6] and they are justified in refusing to

[1] Fisher *v.* Bontine, 1827, 6 S. 330.

[2] Macdonald *v.* Hedderwick & Sons, 1901, 3 F. 674.

[3] Shaw *v.* Kay, 1904, 12 S.L.T. 359 (O.H.).

[4] Somervell *v.* Somervell, 1900, 8 S.L.T. 99 (O.H.).

[5] Sheridan *v.* Peel, 1907, S.C. 577, *following* Henderson *v.* Robertson, 1853, 15 D. 292; Hastings *v.* Chalmers, 1890, 18 R. 244.

[6] Brown *v.* Hay, 1897, 5 S.L.T. 191 (O.H.).

produce letters written by the Solicitor of the Department to one of the parties in the cause.[1] Similarly, a diligence to recover the instructions issued by a State department to their officials, such as the instructions issued by the Inland Revenue to their excise officers as to their duties in sampling liquors, will be refused on the ground of prejudice to the public service.[2] It is, to say the least, undesirable to examine Government officials as to their official reports; and where it was proposed, in an action of damages for personal injuries against a railway company, to examine an Inspector of the Board of Trade with reference to his official report, leave was refused.[3] In an action of damages against two medical men for wrongfully granting certificates to the effect that the pursuer was insane, in consequence of which he had been detained for some months in an asylum, leave was refused to the defenders to recover communications which had passed between the officials of the asylum and the General Lunacy Board for the purpose of showing the pursuer's mental condition while in the asylum, the Board having intimated that they objected to their production on the ground of public policy.[4] The rule applies to official communications passing between public officials regarding the conduct of their subordinates, to the report of a military commission and to the minutes of Public Boards. There is, however, provided that a diligence is granted, nothing to prevent the production of a document otherwise competent in the hands of a Government official, provided that he makes no objection to its production. But where a document is in the hands of Crown officials and no attempt is made to recover it by means of the recognised mode, that is by craving a diligence for its recovery, the party cannot at the trial attempt to prove its contents by parole, on the statement that his failure to ask for a diligence was due to his knowledge of the fact that diligence would be refused, or that having informally requested its production his request had been refused.[5]

*Confidential Communications.*—Whether communications are or are not confidential depends solely on their nature, and not on any

[1] Brown's Trs. *v.* Inland Rev., 1897, 35 S.L.R. 340.

[2] Tierney *v.* Ballingall & Son, 1896, 23 R. 512.

[3] Gibson *v.* Cal. Rly. Co., 1896, 33 S.L.R. 638 (O.H.).

[4] Purves *v.* Gilchrist, 1905, 13 S.L.T. 460 (O.H.).

[5] Dowgray *v.* Gilmour and Others, 1907, S.C. 715.

undertaking, such as, for example, a promise of secrecy; and communications which are essentially confidential do not lose their character by reason of the fact that they have been disclosed to third parties.[1] Communications which are confidential are privileged, and cannot be recovered under a diligence. If at the time the diligence is craved the documents are seen from their nature to be necessarily confidential, the motion for their recovery will be refused by the Court. If, on the other hand, a diligence is granted for the recovery of documents whose production is objected to by the haver on the ground of confidentiality, such objection may always be competently taken before the Commissioner, since every interlocutor granting a diligence implies, if it does not express, the reservation that documents which are confidential cannot be recovered.[2] Written communications between parties,[3] or between the agents of parties[4] who are engaged on the same side of a cause, as, for example, co-defenders, are privileged. On a similar principle, the reports of railway officials to headquarters concerning an accident on the line have been held to be privileged in an action of damages against the company arising out of the accident.[5] Communications passing between a Law Agent and his client with reference to an action actually commenced, threatened, or anticipated, are also privileged,[6] though it is doubtful whether all communications between an agent and his client would not now be held to be equally privileged, as is the rule in England.[7] The privilege is, however, confined to Law Agents, and does not extend to men of business who are not lawyers, as factors, bankers, and accountants, or even to a lawyer who is not professionally employed. The privilege of refusing to disclose such communications belongs to the client, and if waived by him it cannot be insisted in by the agent.[8] The privilege does not extend to the reports made by medical advisers to their insurance companies,[9] but

[1] Moore *v.* Moore, 1899, 7 S.L.T. 254 (O.H.).

[2] M'Donald *v.* M'Donald, 1844, 6 D. 954.

[3] Tannett, Walker, & Co. *v.* Hannay & Sons, 1873, 11 M. 932.

[4] Munro *v.* Fraser, 1858, 21 D. 103, *at p.* 107.

[5] Stuart *v.* G. N. of Scot. Rly. Co., 1896, 23 R. 1005.

[6] Lady Bath's Exrs., 12 Nov. 1811, F.C.; Jarvis *v.* Anderson, 1841, 3 D. 990.

[7] Lawrence, 4 Drew, 485, *appd. in* Minet, L.R. 8 Ch. App. 361; *see* M'Cowan *v.* Wright, 1852, 15 D. 229, *per* Ld. J.-C. Hope and Ld. Wood; Munro *v.* Fraser, *sup.*, *per* Ld. Pres. M'Neill.

[8] Forteith *v.* E. of Fife, 1821, 2 Mur. 467.

[9] Macdonald *v.* Macdonald, 1881, 8 R. 357.

in an action upon a policy of life insurance, the medical reports upon the deceased's health made by the officers of another insurance company, and the medical referee's reports, were held to be confidential, and not recoverable under a diligence.[1] And a diligence was refused for the recovery of letters passing between an insurance office and its agent with reference to the insurable interest of an insurer.[2] In an action between the insurers and the insured in a life policy, the latter, on the averment that he had been induced to accept the policy by misrepresentations and concealment on the part of the insurance company, craved a diligence to recover communications between the company and its officials, but the Court, while granting the diligence with reference to communications between the company's officials and the head office, refused it for the recovery of reports on the insured's state of health made to the company by their medical men.[3] Communications between husband and wife are privileged. But communications made to a spiritual adviser are (probably) not privileged, and those made to a medical man, even in the strictest personal confidence, are certainly not privileged.[4] Communications passing between a master and his servant are not confidential. Thus, in actions of damages arising out of a collision at sea, a diligence to recover communications passing between the master or other responsible officer and the owners of the vessel will in general be granted, provided the communication be one that was made either at the moment of collision or within such a short interval of time as to make such documents really part of the *res gestæ*.[5] And in salvage actions the pursuer has been held entitled to recover communications sent by the officers of the ship to the owners, written at the time of the salvage operations, though not the owner's replies thereto, nor those passing between the pilot and the ship's officers, nor the jottings and diaries kept by the pilot during the voyage.[6] Where, in defence to an action by the owners of a ship against harbour trustees for damages for injury done to the ship through the defenders' fault, the defenders, averring that at the date

[1] Hope *v.* Scot. Accid. Ins. Co., 1895, 3 S.L.T. 254 (O.H.).

[2] Simcock *v.* Scot. Imperial Ins. Co., 1901, 9 S.L.T. 193 (O.H.).

[3] Macdonald *v.* N. Y. Life Ins. Co., 1903, 11 S.L.T. 67 (O.H.).

[4] Hume, ii. 350.

[5] Burngeat *v.* City Line Ld., 1897, 4 S.L.T. 396 (O.H.); *The Talisman*, 1896, 4 S.L.T. 93 (O.H.); *The Solway*, 1885, L.R. 10 P.D. 132.

[6] Mackinnon *v. The America*, 1904, 12 S.L.T. 411 (O.H.); Devlin *v.* Spinelli, 1906, 14 S.L.T. 9 (O.H.).

of the alleged accident the ship was already strained and in disrepair, craved a diligence to recover letters passing between the owners and the master, and reports made to the owners with reference to the vessel's condition at the time, the Court granted it to recover the reports, but refused it with reference to the letters.[1] Documents proving, or directly tending to prove, that the haver has been guilty of a crime cannot be recovered, though if pertinent to the issue it is not a sufficient objection that their disclosure would tend to injure his character.[2] Thus, in one case a servant wrote and gave to his employers a confession that he had been bribed by a partner of a certain firm with whom his employers had business transactions, to order more of their goods than were required, the servant's employers raised an action against the firm and moved for a diligence to recover the confession, but the motion was refused.[3]

*Haver may refuse Production.*—Even if diligence be granted, the haver may always competently refuse to produce the documents called for, on the ground of confidentiality. Where such an objection is taken the decision of the question rests with the Commissioner, from whose decision there is an appeal to the Sheriff. Where an appeal is taken against the decision of the Commissioner admitting a document, it should not, save in cases of grave doubt, be sealed up pending the decision of the Sheriff. It is the duty of the Commissioner to take pains to satisfy his own mind upon the question,[4] and he is not entitled to requisition the services of an outsider, such as an accountant, to undertake a duty which ought to be discharged by himself personally.[5] There may, however, be cases of exceptional difficulty involving the knowledge of accounting in which the Commissioner may be specially authorized to employ the services of a skilled professional man to assist him.[6]

**Haver not Witness.**—The sole object of citing a haver is to enable him to produce the document called for, or if it be not in his

[1] Scott & Others *v.* Portsoy Harb. Co., 1900, 8 S.L.T. 29 (O.H.); *approved in* The Admiralty *v.* Aberdeen Steam Trawling Co., 1909, 1 S.L.T. 1; *see also* Morrison & Mason *v.* Clarkson, 1896, 4 S.L.T. 237 (O.H.), *and* Sutherland *v.* Ritchie & Co., 1900, 8 S.L.T. 93 (O.H.).

[2] Don *v.* Don & M'Pherson, 1848, 10 D. 1046, and cases referred to in Ld. Cunninghame's note.

[3] Whiteley Ltd. *v.* Dobson, Molle, & Co. Ltd., 1902, 10 S.L.T. 39 (O.H.)

[4] Stewart, Govan, & Co. *v.* Birrell, 1897, 5 S.L.T. 226 (O.H.).

[5] Cassils & Co. *v.* Absolon, 1907, 15 S.L.T. 48 (O.H.).

[6] Whiteley Ltd. *v.* Dobson, Molle, & Co. Ltd., *sup.*

possession to explain how, where, and when it passed out of his possession.[1] It is therefore incompetent to examine a haver on the merits of the cause.[2] A haver, after satisfying the production, may competently be asked by the other side whether he has in his possession any other documents bearing on the matter at issue, and if his answer be affirmative, he may be compelled to make full production.[3]

**Procedure in obtaining Diligence.**—The diligence is obtained by motion, a specification of the documents required being lodged and intimation being made to the opposite party. After hearing parties, the Sheriff either grants or refuses diligence for the recovery of the documents included in the specification in whole or in part. If the diligence be granted, a commission for the recovery of the documents is granted to an advocate or a Law Agent, or, if the commission is to be executed abroad, to some person acquainted with the law of Scotland, or failing such person to a lawyer, public official, or consul. A copy of the interlocutor granting the commission and diligence, certified by the Sheriff-Clerk or his assistant, is sufficient warrant for the Commissioner to act. A report of the proceedings, along with the documents recovered and duly signed by the Commissioner, is then lodged in process. After the evidence of each haver is given, it is read over to and signed by him, the Commissioner, and his clerk, each page, or at least each sheet, being so signed. The documents produced are docquetted on the back by the haver, Commissioner, and Clerk as referred to in the former's deposition. If numerous they may be numbered, and docquetted as conform to an inventory. When the diligence allows excerpts to be taken at the sight of the Commissioner, such excerpts are usually made by the haver or the Commissioner's clerk, and compared by the Commissioner with the books or documents from which they are taken. The procedure before the Commissioner is practically the same as in a commission to take evidence.

**Expense of Commission.**—The expense of a commission and diligence to recover documents forms part of the expenses *in causa*, and will be awarded to the successful party even if no documents are recovered.[4] But the expense will be disallowed where such

[1] Cullen *v.* Thomson, 1863, 1 M. 284 ; Gordon *v.* Davidson, 1865, 3 M. 938.

[2] Somervell *v.* Somervell, 1900, 9 S.L.T. 84 (O.H.).

[3] Dunlop's Trs. *v.* Belhaven, 1852, 14 D. 852 ; Thorburn & Trueman *v.* Hoby & Co., 1853, 15 D. 767.

[4] M'Leod's Trs. *v.* Leslie & Others, 1868, 5 S.L.R. 687.

party recovers documents under the diligence but does not use them.[1]

**Bankers' Books.** — The provisions of the Bankers' Books Evidence Act, 1879, with regard to the recovery of bankers' books have already been considered.[2]

**Citation of Havers.**—The citation is made in the same way, and is subject to the same rules, as the citation of witnesses under a commission, which is dealt with later.

## II. Commissions to take Evidence

**When Competent.**—Where a proof had been allowed, it was formerly competent for the Sheriff to grant commissions to take evidence in two cases only—(*a*) where the witness was resident beyond the jurisdiction of the Court; or (*b*) where by reason of age, infirmity, or sickness he was unable to attend the diet of proof.[3] In the first case the Sheriff exercised his discretion whether to issue a commission, in the second he had no choice. But in all other cases the granting of a commission was absolutely incompetent, and no excuse, however satisfactory, and no considerations of convenience, however obvious, could, even with the consent of parties, make it competent.[4] Under the provisions of the earlier Act, evidence on commission was competent only after an interlocutor allowing proof had been issued. The Act of 1907 effects at least one important amendment of previous practice. Under its provisions the evidence of any witness or haver may be taken on commission if (*a*) he be resident beyond the jurisdiction of the Court; (*b*) although resident within the jurisdiction he resides at some place remote from the seat of the Court; or (*c*) he is, by reason of illness, age, or infirmity, unable to attend the diet of proof or jury trial.[5] While the Act does not in terms direct that a commission to take evidence shall be competent only after an interlocutor allowing proof has been issued, it seems obvious, both from the wording of the clause and from its position relatively to other clauses dealing with proof, that the Act contemplates in this rule, that before a commission to take evidence can become competent, such an interlocutor must have been pro-

[1] Mackie & Stark *v.* Cruikshank, 1896, 4 S.L.T. 84 (O.H.)

[2] *See ante*, p. 185.

[3] Act, 1853, s. 10.

[4] Dove Wilson, p. 271, *and cases cited.*

[5] Act, Rule 70.

nounced. In any event, the only end which could be subserved by appointing a commission to take evidence before a proof has been allowed, may be otherwise obtained under the rule with reference to commissions to take evidence to lie *in retentis*. Otherwise it is apparent that the Act simply re-enacts the corresponding provisions of the earlier Act, with the important addition that a commission may now be granted to take the evidence of a witness actually resident within the jurisdiction, provided only that such residence is "remote" from the place where otherwise his evidence would necessarily be taken. The decisions applying to the corresponding provisions of the Act of 1853 seem still authoritative, and it would therefore appear that in all cases other than those specifically provided for by the rule, the granting of a commission to take evidence is absolutely incompetent, and that no excuse however satisfactory,[1] and no considerations of convenience however obvious,[2] can, even with the consent of parties, make it competent. But while the Act, like its predecessors, clearly contemplates that a commission to take evidence shall be competent only after a proof has been allowed and before such proof is actually led, there is nothing in its terms which would prevent the granting of a commission subsequent to the diet, as for example where a proof in replication is allowed. It would therefore appear to be competent, in exceptional circumstances and for sufficient reasons, as for instance where a witness, whose presence at the proof is confidently anticipated, suddenly takes ill or is ordered abroad on the very eve of the trial, to grant a commission to take his evidence, even after the leading of the proof has actually commenced. In such a case, however, the commission would probably be granted only on payment of such expenses as may have been occasioned by the interruption. Obviously, however, commission should be moved for and carried out so as to cause the minimum of inconvenience in the way of unnecessary adjournments of, or interruptions in, the proof once it has begun.

*Witness outwith Jurisdiction.*—No Court in this country possesses the power to compel the attendance of witnesses who are resident outwith the United Kingdom, and unless such witnesses attend voluntarily their evidence can be made available only by a commission. Where the evidence of any witness resident abroad is material for the determination of a cause depending before a Sheriff

[1] Byres *v.* Forbes, 1866, 4 M. 388. [2] Steuart *v.* Grant, 1867, 5 M. 736.

Court, and the evidence of such witness is, in respect of the law and practice of the country in which he is resident, not obtainable by commission, the party desiring to obtain such witness's evidence may by minute apply to the Sheriff for a letter of request, signed by him, addressed to the judges of the foreign tribunal within whose territory the witness is residing, praying them to order the attendance of the witness before them, to examine the witness upon interrogatories accompanying the letter of request, and to transmit the witness's answers to the Secretary for Foreign Affairs for transmission to the Sheriff.[1] In the case of a witness resident outwith Scotland but within the United Kingdom, the Court of Session or any Judge of the Court possesses the power of ordering that a warrant of citation shall issue in special form commanding such witness to attend the trial, wherever he may be within the United Kingdom, the service of which is valid and effectual as if made within the jurisdiction of the Court.[2] No such power is, however, vested in the Sheriff. The evidence of a witness resident outwith the jurisdiction of the Sheriff, whether he reside in England or Ireland, can be made available only by commission.

*Witness within Jurisdiction but remote from Court.*—The Act for the first time makes it competent to take on commission the evidence of a witness resident within the jurisdiction who is not incapacitated by age, illness, or infirmity from attending the diet of proof. But the commission is competent only where the witness's residence is "remote" from the seat of the Court. The Act does not in any way define what constitutes "remoteness," and the matter is left entirely to the discretion of the Sheriff.

*Witness incapacitated by Age, Illness, or Infirmity.*—Where the ground of application is age alone, it is now a rule, practically without an exception, that the witness must be seventy years of age or upwards.[3] Formerly the Court required certificates as to age before granting the commission, but the practice now is to grant power to the Commissioner to examine such witnesses as are proved to his satisfaction to be not less than seventy years of age.[4] As to what will be considered illness or infirmity sufficient to prevent the attendance of

[1] A. S., 2nd Feb. 1893.

[2] The Attendance of Witnesses Act, 1854, as amended by 47 & 48 Vict. c. 61, s. 16; *see* Pirie *v.* Cal. Rly. Co., 1889, 27 S.L.R. 490; Macdonald *v.* Highland Rly. Co., 1892, 30 S.L.R. 201.

[3] Wilson *v.* Young, 1896, 4 S.L.T. 113 (O.H.).

[4] Mackay's Manual, 366.

a witness and to justify the granting of a commission to take his evidence, no exact definition is possible. It may, however, be said generally that any illness or infirmity of such a character as to render the attendance of the witness at the trial improbable, or of such a nature as to make the witness's attendance at the trial likely to be attended with dangerous or fatal consequences, will justify the grant of a commission. In one case it was granted where the witness was in advanced pregnancy.[1] In all cases of illness and infirmity, a medical certificate on soul and conscience should be produced when the motion is made.[2]

*Evidence of Parties on Commission.*—The evidence of a party to the cause may competently be taken on commission; but to justify such a proceeding the circumstances must be very special. In one case the evidence of a pursuer resident in South America was allowed to be taken on commission,[3] and in another the same course was followed where the pursuer was a clergyman permanently settled in Australia.[4] In the case of a jury trial, which owing to the pursuer's ill-health was postponed from time to time, a commission was appointed to take his evidence when after the lapse of a year there did not appear to be any prospects of his recovery.[5] In one case the defender was allowed to be examined on commission where the pursuer waived his right to refer to the defender's oath.[6] But the examination of a party on commission has in several cases been refused,[7] or granted only under reservation of the question of its competency,[8] though the tendency of the Court seems to be towards a relaxation of the severity of the rule.

**Mode of granting Commissions.**—The commission is granted on the motion of the party who desires it. The interlocutor allowing the commission may fix the time for taking the proof under it. Usually, however, no specific date is mentioned, but provision is made that notice of the diet of a certain length shall be given to the parties. The commissioner is also named, either specially or by

[1] Gordon *v.* Orrock, 1859, 11 D. 1358.

[2] Mackay's Manual, 366.

[3] Sampson & Co. *v.* Hough, 1886, 13 R. 1154.

[4] Robertson *v.* Robertson, 1897, 4 S.L.T. 495 (O.H.).

[5] Anderson *v.* Morrison, 1905, 7 F. 561.

[6] Laing *v.* Nixon, 1866, 4 M. 327; Tosh *v.* Ogilvie, 1873, 1 R. 254.

[7] Sofio *v.* Gillespie & Co., 1867, 39 Jur. 268; *see* Donnar *v.* Paterson, 1859, 21 D. 1301; Hansen *v.* Donaldson & Son, 1873, 1 R. 237.

[8] Sheard *v.* Haldane, 1867, 5 M. 636.

description. If the proof is to be taken within Scotland, the Commissioner must be either the Sheriff, the Sheriff-Clerk, or his depute, a Law Agent of at least three years standing, or a J. P. or other magistrate.[1] The commission need not name the particular witnesses who are to be examined. It is, however, sometimes desirable that the witnesses should be named, and it is not uncommon in practice to add to the interlocutor granting the commission, after specifying the names of the witnesses, "and such other witnesses as shall be proved to the satisfaction of the Commissioner to be not under the age of seventy or in a bad or dangerous state of health."[2] The interlocutor further fixes a time[3] within which the commission must be reported. In the Court of Session, witnesses are examined on commission, on interrogatories settled by the parties and approved by one of the principal Clerks of Session or record Clerk,[4] though it has become a common and, in proofs before a Judge, almost a universal practice to dispense with interrogatories, which have been found cumbrous and inconvenient. In the Sheriff Court interrogatories need not be adjusted, though, if the parties so agree, there is nothing to prevent such a course being followed. Where the witnesses are resident abroad and there are no skilled lawyers to examine them, the use of interrogatories may prove of much advantage. Even where interrogatories are adjusted, the Commissioner may put such additional questions to the witnesses as he may deem necessary or advisable, provided he takes care to distinguish the questions so put by him.[5]

**Citation of Witnesses.**—The provision for citing witnesses contained in the Act of 1853, like that contained in the Act of 1838, was applicable only to the case of their being required to attend before the Sheriff, and no provision either in these or the subsequent Acts was made by which the attendance of a witness before a Commissioner could be compelled. The attendance upon a Commissioner of a witness resident outwith the territory could be enforced only in the same way as before an arbiter, the party desiring the presence of the witness proceeding by summary application to the Sheriff within whose jurisdiction the witness resided to compel his attendance. It was, however, doubtful if a witness could be made to leave the jurisdiction of his own residence

[1] *See* A. S. 10th July 1839, s. 69.
[2] *See* Watsons, 1829, 8 S. 261; Oswald *v.* Lawrie, 1824, 3 S. 269.
[3] Usually *quam primum.*
[4] A. S. 16th Feb. 1841, s. 21.
[5] *See ibid.*, s. 17.

to attend a Commissioner. The Act of 1907 provides that a copy of the interlocutor, certified by the Sheriff-Clerk, allowing a proof or fixing a diet for the trial of any action or for the examination of witnesses or havers, or fixing a date for jury trial, is a sufficient warrant for the citation of witnesses and havers, either before the Sheriff or a Commissioner.[1] The copy interlocutor may be executed within the jurisdiction of any Sheriff, without indorsation by the Sheriff-Clerk of that jurisdiction, either by registered postal letter or by an officer. If executed by an officer, he may be either an officer of the Court granting the interlocutor or of the jurisdiction within which it is to be executed.[2] If any witness or haver, duly cited on an inducię of at least forty-eight hours and after having been tendered his travelling expenses (if they have been demanded), fail to attend a diet either before the Sheriff or the Commissioner, he may be ordained to pay a penalty of forty shillings, unless a reasonable excuse for his absence be offered and sustained. The Sheriff may grant decree for the penalty in favour of the party on whose behalf the witness or haver was cited. If the commission be issued to some person resident outwith Scotland but within the United Kingdom, the mode of compelling the witness's attendance is still regulated by the Statute 6 & 7 Vict. c. 82. When the witness is outwith the United Kingdom, as has been seen, a letter of request from the Sheriff addressed to a foreign Court may be obtained under the provisions of the Act of Sederunt of 1893.

**Examination of the Witnesses.**—At or before the diet the Commissioner formally accepts the Commission. He appoints a Clerk, to whom the oath *de fideli* is administered. The Commissioner must attend and conduct the whole proceedings, which under the provisions of the Act are conducted in the same manner as a proof before the Sheriff. The depositions of the witnesses therefore may be taken by the Commissioner himself, or by the Clerk or a short-hand writer nominated by the Commissioner, to whom the oath *de fideli* is administered. The evidence may be recorded in narrative form or by question and answer, according as the Commissioner may direct; and if taken in shorthand, the extended notes of evidence, certified by the Clerk or shorthand writer respectively, become the notes of the witnesses' evidence in the cause. The Commissioner has power, if he thinks fit, to dictate to the Clerk or the shorthand

[1] Act, Rule 71. [2] Act, Rule 10.

writer what he is to record. Under the former procedure the Commissioner might either dictate the evidence to the Clerk or cause it to be taken in shorthand. If the proof were taken in the former way, it required to be signed by the witness, Commissioner, and Clerk on each page and at each marginal note. The Act of 1907, while it provides that this mode of taking the evidence may still be adopted, makes no special provision for the manner in which the evidence so taken is to be authenticated. It would therefore seem proper, in the absence of judicial decision to the contrary, that the former practice should in this respect still prevail in the rare cases in which such a mode of recording the evidence is seen fit to be adopted. Where the Sheriff sees fit to record the evidence in his own hand, his signature will probably be the only authentication necessary. Where the evidence is taken in shorthand, it does not, by the terms of the Act, appear necessary that the Commissioner should sign the depositions of the witnesses, though of course his signature will appear at the end of the evidence as reporting the Commission. As, however, the advantage to be gained by having each page and any marginal addition authenticated by the Commissioner's signature is sufficiently obvious, and as no distinct benefit seems likely to accrue from the discontinuance of a well-established practice, which is still observed in the procedure of the Court of Session, it will perhaps be considered advisable that the Commissioner should continue to sign as formerly. Each witness must be sworn and the fact recorded.[1] The Act does not lay down any directions beyond those specified for the guidance of Commissioners in taking the depositions of the witnesses. But the recommendations made by the Act of Sederunt of 11th March 1800 (made perpetual by A. S. of 22nd June 1809), which are applicable to Commissions granted by the Supreme Court, apply equally to those granted in the Sheriff Court. The Commissioner should not therefore allow any matter to be introduced which is not pertinent to the cause, nor should he allow any unnecessary pleading or altercation about the competency of questions or the admissibility of witnesses, and he should check the parties if they attempt to load the proceedings with unnecessary evidence or superfluous matter of any kind. He may put such questions as he thinks necessary to elucidate the matter. If in the course of the deposition it appears that a witness is not disposed to be truthful, or

[1] *See* A. B., 1838, 16 S. 630.

behaves in an unusual manner, he should note the fact, by way of assistance to his memory, in case he should be appealed to on the subject by either of the parties when the proof comes to be advised; or if he thinks proper he may annex a note of the fact to his report. He decides on all objections to evidence except confidentiality, but when confidentiality is pleaded he should report the objection to the Sheriff.[1] Where he repels or sustains any objection, other than that of confidentiality, the objection stated and any answer made to it must, if the objector so desires, be shortly noted on the notes of evidence to the Commissioner's dictation. The examination of the witness, notwithstanding the objection, must, however, proceed. If the objection be considered of sufficient importance, the Commissioner may direct the evidence to be taken on a separate paper. But it is not competent during the course of the examination of the witness to submit to review any judgment pronounced upon the competency of the evidence.[2]

**Expenses of Commission.**—The expense of a Commission, where necessary, forms parts of the expenses *in causa*.[3] When a shorthand writer is employed to record the evidence, he is, in the first instance, paid by the party moving for the Commission. The agents of the parties are personally responsible for the shorthand writer's fees, and the Sheriff may make an order directing payment to be made.[4] Such an order, if not implemented, entitles the Sheriff to dismiss the action, or to grant decree as craved, or of absolvitor, with expenses.[5] An agent who cites a witness is personally responsible for such witness's fees.[6]

**Report of Commission.**—When the evidence has been duly recorded, the Commissioner sends the report of it to the Sheriff-Clerk. The Commissioner cannot be compelled to give up his report until his fees and those of his Clerk have been duly paid. The Act of Sederunt of 10th April 1908, regulating the fees of solicitors, is silent on the subject of the fees payable to Commissioners, and the Sheriff must therefore, as formerly, fix the remuneration of the Commissioner and his Clerk at such sums as appear to him to be reasonable. The Act makes no provision for the payment of the

[1] Dickson on Evidence, p. 982.
[2] Act, Rule 74; A. S. 1839, s. 79.
[3] Graham *v.* Borthwick, 1875, 2 R. 812.
[4] Act, Rule 67.
[5] Act, Rule 56.
[6] Act, Rule 72.

Commissioner's fee, but the party moving for the Commission must, it is thought, pay his fee in the first instance, though ultimately such fee will form part of the expenses *in causa*.

### III. Depositions to Lie *in retentis*

**When competent.**—As has been seen, after an interlocutor allowing a proof has been issued, the evidence of witnesses outwith the jurisdiction, or who for certain reasons are unable to be present at the trial, may be taken on commission. Under the provisions which regulated practice previous to the Act of 1907, a commission might be granted to take the evidence, at any stage of the cause, of witnesses who were about to leave Scotland, or of those whose evidence was in danger of being lost owing to extreme old age or dangerous illness.[1] Now, however, under the provisions of the recent Act, *any* evidence which is *for any reason* in danger of being lost may be taken to lie *in retentis*, and the Sheriff, if satisfied that it is desirable to do so, may, upon the motion of either party and at any time, either take the evidence himself or grant authority to a Commissioner to take it. The evidence of any witness, including that of the parties to the cause,[2] may therefore be taken to lie *in retentis*, but before allowing a party to be so examined the Court may call upon the opposite party to waive his right to refer to such party's oath,[3]—a right which would have been forfeited had the party been adduced by his opponent in an ordinary proof.[4] To entitle a party to preserve evidence in this way, the cause must be actually pending, that is, the initial writ must have been executed, since in the Sheriff Court it is incompetent to move that evidence may be taken to lie *in retentis* with a view to a future action. Whether the application shall or shall not be granted is now entirely within the discretion of the Sheriff. If, however, the application be made before the closing of the record, some special urgency will probably require to be shown to justify its being granted, since otherwise a party might thus be enabled to obtain precognitions from his opponent's witnesses to aid him in the statement of his case.[5]

[1] A. S. 1839, s. 73.

[2] *See* Hansen *v.* Donaldson, 1873, 1 R. 237; Sheard *v.* Haldane, 1867, 5 M. 636; Sampson *v.* Hough, 1886, 13 R. 1154.

[3] Laing *v.* Nixon, 1866, 4 M. 327.

[4] Evidence Act, 1853, s. 5.

[5] *See* Laing *v.* Nixon, *sup.*

**Mode of taking Depositions.**—The application is made by motion on the part of either of the parties. The Act makes no further provision with regard to the matter. As, however, in accordance with its terms, the Sheriff must be satisfied that the granting of the application is "desirable," the application will, in practice, as formerly, be probably embodied in writing, either in the form of a minute or otherwise, setting forth specifically the names of the witnesses whose evidence it is desired to obtain and the reasons which make the application necessary. Along with the minute should be lodged any documentary evidence, such as certificates of old age or illness, necessary to support the application. Where the application is made before the closing of the record, for the reasons already indicated, a specification of the precise fact or facts in regard to which the evidence of the witness is desired, will probably be necessary. The parties are then heard orally, and the Sheriff gives his decision either *viva voce* or by interlocutor. If the application be granted, the evidence may, in the Sheriff's discretion, be taken either before himself or by a Commissioner, in the same manner as other commissions to take evidence. In the Court of Session, under the Act of Sederunt regulating procedure, the adjustment of interrogatories is imperative, an ordinary commission being incompetent.[1] There is nothing to prevent interrogatories being adjusted in the Sheriff Court if the parties mutually agree. But as even in the Court of Session it has become the almost universal practice to dispense with interrogatories, which in practice have been found cumbrous and inconvenient, the adoption of such procedure in the Sheriff Court is, except perhaps in very exceptional cases, unlikely.

**Expense of Proof.**—The expense of the proof, where necessary, forms part of the expenses *in causa*. The rules with regard to the payment of the shorthand writer, where one is employed, and of the witnesses are the same as those regulating other commissions to take evidence. As evidence to lie *in retentis* is taken in the interest of the party who moves for the commission, the expense of any evidence which is not ultimately used falls on such party;[2] though where the improbability of the witness being able ultimately to attend the diet of proof is very great, or for other sufficient reason, the expense of such evidence may be allowed.[3] In one case, the expense of a

[1] M'Lean & Hope *v.* Fleming, 1867, 5 M. 579.

[2] Couper *v.* Cullen, 1874, 1 R. 1101.

[3] Graham *v.* Borthwick, 1875, 2 R. 812.

witness who had been brought an unnecessarily long distance was disallowed.[1]

**Effect of Proof** *in retentis.*—The Act does not specifically deal with the effect of evidence taken to lie *in retentis* in view of a proof, though it does in the case of a jury trial.[2] The provisions of the Act with reference to evidence taken to lie *in retentis* with a view to a jury trial, practically embody the rules applicable to existing practice both in the Sheriff Court and in the Court of Session, and would therefore seem to apply equally to the case of evidence taken with a view to proof. Proof *in retentis* is taken under reservation of all pleas competent to the party against whom it is taken, including preliminary pleas and objections to the jurisdiction.[3] The evidence can only be competently used at the trial, unless of consent, if the witness is unable to appear, the Sheriff being satisfied as to the reasons for his absence. To save expense, however, it is usual in practice for both parties to consent to the evidence taken on commission being held as the evidence *in causa.* If the witness appears at the diet of proof, his deposition taken to lie *in retentis* cannot, of course, be referred to in any way.

[1] Parker *v.* N. B. Rly., 1900, 8 S.L.T. 18 (O.H.).

[2] Act, Rule 138.

[3] Moreton *v.* M'Donald, 1849, 11 D. 1417.

# CHAPTER XXI

## PROCEDURE WITH A VIEW TO OBVIATING OR SHORTENING PROOF

### I. Judicial Remits


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### I. Judicial Remits

**When competent.**—At the closing of the record, or at any other stage of the cause, the Sheriff may either *ex proprio motu* on the motion of one of the parties, or on the joint motion of both, remit to a person of skill or other person to report on any matter of fact connected with the cause.[1] The rule is expressed in unqualified terms, but its object appears to be not to alter or modify, but rather to adopt the existing law and practice with reference to judicial

[1] Act, Rule 60.

remits. Cases therefore decided prior to the passing of the Act may be regarded as still authoritative. The cases in which remits to persons of skill are appropriate are those which require for their decision the observation or opinion of persons endowed with special skill or knowledge, such as engineers, architects, accountants, and surveyors, to whom such matters of fact or of opinion as are connected with the cause are remitted for report. A judge cannot delegate his duty to decide on questions of law submitted for his decision, and therefore a remit on a question of pure law is incompetent,[1] though where a deed, scheme, or complicated title requires special legal knowledge for its preparation, a remit may be made for the purpose to a lawyer with the necessary legal knowledge.[2] It would, however, appear that a remit to a professional person to report is objectionable, if not absolutely incompetent, where a reference to oath is the only competent mode of proof in the cause. Thus, if prescription be pleaded, that plea must be disposed of *ante omnia*; if it be sustained, a remit is incompetent unless it arise on the deposition of the party.[3]

**Time for.**—Except in exceptional circumstances, the remit should be made after the record has been closed and the preliminary pleas disposed of, but before proof has been allowed.[4] In cases of urgency, as when the subject of the remit is of a perishable nature, the remit may be made before closing the record.[5] Similarly, it is frequently expedient to remit to a land surveyor to prepare a plan of a disputed locality before the record is made up, in order that the parties may refer to the plan, instead of being compelled to make lengthy statements. It is not, however, incompetent to make a remit after proof has been partially led, or even when the evidence in the cause has been exhausted.[6] In certain cases, however, such as those connected with nuisances, river pollution and the like, after the facts have been ascertained in the usual way, it is both competent and usual to remit to a man of skill to report upon or to suggest remedial measures and to see his recommendations given effect to, as, for instance, the best way to regulate the exercise

[1] Quin *v.* Gardiner & Sons, 1888, 15 R. 776.

[2] Mushet *v.* D. of Buccleuch, 1851, 13 D. 715.

[3] Rose *v.* Macleod, 1828, 7 S. 140.

[4] Rose *v.* Macleod, *sup.*; Fettes *v.* Buchanan, 1828, 7 S. 141.

[5] *See* Nisbet *v.* Mitchell Innes, 1880, 7 R. 575.

[6] *See* Leonard *v.* Lindsay, 1886, 13 R. 958.

of water rights so as not to interfere with the rights of upper proprietors.[1]

**Remits not of Consent.**—Where the Sheriff makes a remit either *ex proprio motu* or on the motion of one party unassented to by the other, further proof is not thereby excluded. The Sheriff is not entitled, except in very exceptional circumstances, to refuse or exclude proof by referring the subject of contention between the parties to the final decision of a third person, unless both parties consent.[2] Conversely, a litigant is entitled to prove his averments in accordance with the ordinary rules of civil procedure, and he cannot therefore without his consent be compelled to accept the judgment of any other than the duly recognised and constituted judge before whom his cause depends.[3] Facts in dispute between the parties must therefore in the ordinary case be determined in the usual way by a proof at large, and it is consequently incompetent for either of the parties to move the Sheriff for a remit to a man of skill with the object of excluding proof.[4] As a preliminary to a proof in complicated or technical cases, a remit to a man of skill may be a valuable method of obtaining information on matters of fact or of opinion pertinent to the issue with the least possible expense or inconvenience, but except with the consent of both parties it cannot be used as a means of casting the burden of deciding the case upon the shoulders of a third person. A remit, therefore, which is not assented to by either of the parties, whether it be expressed to be before answer or not, is without prejudice to any course of investigation of the matters in dispute which may afterwards be considered proper. There would appear, however, to be certain cases, the most familiar of which is that about fixtures, in which the Court has the power of making a remit to a man of skill, whose report is binding on the parties, even if their consent to the remit has not been obtained. In one case where the question at issue was the allowance for annual repairs on machinery to be deducted in fixing the assessment of a mill-owner for poor-rates, the Court, notwithstanding the protest of one of the parties, remitted

[1] E. of Kintore *v.* Pirie & Sons Ltd., 1906, 7 F. 1058; 8 F. (H.L.) 16.

[2] Galbreath *v.* Taylor, 1843, 5 D. 423; Quin *v.* Gardner & Sons, *sup.*; *see* Bankes *v.* Anderson, 1899, 1 F. 1194.

[3] Pearce Bros. *v.* Irons, 1869, 7 M. 571.

[4] Sutherland *v.* Squair, 1898, 25 R. 656; Steel *v.* Steel, 1898, 25 R. 715; Mags. of Kilmarnock *v.* Reid, 1897, 24 R. 388.

to a man of skill to report, on the ground that such a course was usual and appropriate in such cases. The decision in that case, however, reversed that of the Lord Ordinary, and at least one of the learned Judges expressed grave doubts as to its wisdom.[1] The general rule is subject to the observation, that where the parties prior to the litigation have bound themselves to abide by the decision of a referee, the report of such referee will be final. Thus in one case a building contract provided that the work connected with it should be done to the satisfaction of a named architect. In an action for the price the defenders pleaded that the work was disconform to contract, and the Court remitted the question to the architect named. On his report that he was not satisfied with the work, and that it would take more than the sum sued for to make the work conform to the contract, it was held that this report was final. Proof was therefore refused and the action dismissed.[2] The report of a remit is not evidence, though it may be made evidence if the reporter depone to its truth as a witness *in causa*. It should not, therefore, except in exceptional cases, be made the foundation of the Sheriff's judgment.

**Remits of Consent.**—When a remit is made by consent of both parties (which is generally understood in practice to mean one in which both parties acquiesce or to which neither party objects), the report of the person to whom the remit is made is final and conclusive with respect to the matter remitted.[3] If the interlocutor bear that the remit has been made of consent, no other evidence of the consent is necessary, and if neither party takes objection to the interlocutor and allows the reference to proceed, objections that the remit was not of consent will in general be barred.[4] But where an interlocutor bears to be of consent, and the party denies having given consent, the Supreme Court has full power to deal with the representation on general principles by remit to the Sheriff or otherwise.[5] Though a remit of consent "before answer" is final and conclusive as to the facts remitted, it leaves the relevancy open.[6]

**Procedure in Remit.**—The reporter does not as a rule hear evidence, but if he elect to do so the evidence must be such as

[1] Broxburn Oil Co. *v.* Morrison, 1903, 5 F. 694, Ld. Kinnear *dub.*

[2] Barclay *v.* Bruce's Trs., 1904, 12 S.L.T. 100 (O.H.).

[3] Act, Rule 60.

[4] Pearce Bros. *v.* Irons, 1869, 7 M. 571; Wilson *v.* Struthers, 1837, 15 S. 523.

[5] Whyte *v.* Whyte, 1895, 23 R. 320.

[6] Galbreath *v.* Taylor, *sup.*

might competently have been taken in a proof before the Court.[1] As a rule he contents himself with an examination of the subject in dispute, and with such explanations with regard to it as the parties or persons in their employment are desirous or able to give. Both sides must be treated in the matter of examination, explanation, or otherwise with strict impartiality.[2] Where the Court orders specific performance, at the sight of a reporter, as for instance of a building obligation, the reporter's function is to see that the work is duly begun and proceeded with, and on its completion to report upon its adequacy as implementing the obligation of the parties. But criticisms by him on the plans, before building has been begun, are premature.[3]

*Objections to Report.*—The Act of Sederunt of 1839 (sec. 89) permitted the Sheriff to allow objections to the report, and answers to those objections, and it also gave him power to order a revisal of such objections and answers, while the Act of 1853 provided that such pleadings should contain no argument.[4] The Act of 1907 is, however, silent on the subject. It cannot, however, be doubted that errors of fact appearing *ex facie* of the report, or errors of opinion (though not the facts on which such opinion is based) in remits other than those in which the obtaining of the opinion of the reporter is the matter of remit, may be objected to.[5] Where a report is ambiguous or contradictory in its terms, or where a remit has been made to more persons than one, and the terms of their several reports are ambiguous or contradictory, the Sheriff may again remit the matter to the same or new reporters.[6] Where a reporter to whom a judicial remit is made dies before completing the necessary report, a remit may be made to a new reporter in his place, even although one of the parties objects, provided he has been a consenting party to the original remit.[7]

**Expense of Report.**—While ultimately the expense of a remit forms part of the general expenses in the cause, the initial expense falls upon the party moving for it, or, where the remit is made on joint motion or by the Sheriff *ex proprio motu*, on the parties equally,

[1] Robertson *v.* Murphy, 1867, 6 M. 114.

[2] Macfarlane *v.* Gibb, 1884, 12 R. 114.

[3] Marshall *v.* Callender and Trossachs Hydro. Co., 1897, 24 R. 712.

[4] S. 12.

[5] Cameron *v.* Anderson, 1844, 7 D. 100.

[6] Fyffe *v.* Fyffe, 1840, 2 D. 1001.

[7] L. Blantyre *v.* Glasgow & Greenock Rly., 1851, 13 D. 570.

unless the Sheriff sees fit to order otherwise.[1] Such expenses fall upon the "parties," and apart from special agreement the agents in the cause are not personally responsible to the reporter for his remuneration.[2] The amount of the reporter's remuneration is fixed by the Sheriff, and the reporter may appear in the process and get decree for it in his own name.[3] The reporter has a lien on his report for his expenses, and he will not be ordered to lodge it until his expenses have been paid. Where the expense falls on both parties and one party has paid his share, the Sheriff will not, as a general rule, appoint the report to be lodged in process until the other party has paid his share,[4] though in exceptional cases such an order may be made.[5]

## II. Judicial References

A judicial reference is a proceeding by which the question in controversy between the parties, or some part of it, is withdrawn from the decision of the Court and submitted to that of one or more arbiters selected by the parties mutually.

**How made.**—A judicial reference can be entered into only by the consent of both parties. This consent is contained in a joint minute signed by the parties or their agents, stating that they have agreed to refer the cause, or a specified part of it, to the decision of a named arbiter or arbiters, or to an arbiter or arbiters to be chosen by the Court. A reference "of the process, with the whole claims and disputes thence arising,"[6] or "of the action and all questions between the parties,"[7] will be held to be confined to such claims and disputes as are specified in the record. So a reference of the "whole cause" must be taken to mean the cause as it existed at the date when the minute of judicial reference was signed. If, therefore, any part of the cause has already been the subject of judicial decision, such part will be held not to fall within the scope of the reference, since it is incompetent to refer a matter

[1] Act, Rule 60.

[2] A. S. 10th April 1908; Gen. Reg., s. 13; *see* A. S. 1878, s. 12.

[3] Brown *v.* Gordon, 1827, 5 S. 514; Sutherland *v.* Goalen, 1855, 17 D. 509; Ballantyne *v.* Reddie, 1884, 22 S.L.R. 136.

[4] Sutherland *v.* Goalen, *sup.*

[5] M'Queen *v.* M'Queen's Trs., 1851, 13 D. 502.

[6] Roberts *v.* Roberts, 1833, 12 S. 210.

[7] Clyne's Trs. *v.* Edin. Oil Gas Light Co., 1835, 13 S. 413, and 2 S. & M'L. (H.L.) 243.

on which the decision of the Court has already been obtained.[1] A general reference of all disputes between the parties, including those in the action in which the reference is made, is competent, the precise questions referred appearing from the claims lodged. It is within the mandate of counsel, though not of an agent, to consent on his client's behalf to a judicial reference, and an agent in order to bind his client must have his client's special authority for the adoption of such proceedings.[2] Where the cause or dispute is referred to the decision of two arbiters, power should be given them, in the event of their differing in opinion, to choose an oversman; or the parties themselves may appoint an oversman to act on the occurrence of a difference of opinion between the arbiters chosen. To make the reference complete, and to prevent either party resiling from it, the authority of the Court must be interponed to the joint minute.[3] Where, however, the parties appear and plead before the referee, they will be held to have waived any objection to the absence of an interlocutor interponing such authority,[4] and in any event, if the reference have been made with the sanction and approval of the Sheriff, it is doubtful whether the mere absence of an interlocutor giving formal consent would invalidate the proceedings.[5] The reference constitutes a contract between the parties to withdraw the case from the Court and to substitute the decision of the referee for that of the Judge, and therefore once the authority of the Court has been interponed the reference cannot be recalled by either party without the consent of the other, nor can either party resile from it.[6] Any party to the cause may be a party to a reference, and his consent will bind all those whom he represents; but a trustee in a sequestration, it may be noted, requires the consent of the Commissioners to enter into a reference binding the bankrupt estate or the bankrupt and his creditors.[7]

**Time for.**—A judicial reference may be entered into at any stage of the cause while it is still *sub judice*. It may therefore be entered into either before or after the closing of the record. Where parties agree to a reference of a cause in which the record has been made

[1] Brown's Trs. *v.* Horne, 1907, S.C. 1027.

[2] Livingston *v.* Johnston, 1830, 8 S. 594.

[3] Reid *v.* Henderson, 1841, 3 D. 1102.

[4] Fairley *v.* M'Gown, 1836, 14 S. 470.

[5] Fairley *v.* M'Gown, *sup.*; Simpson *v.* Gillon, 1859, 21 D. 243, *per* Ld. Cowan, *at p.* 249.

[6] Walker *v.* Stewart, 1855, 2 MacQ. 424.

[7] Bankruptcy Act, 1856, ss. 85, 176

up, the reference will be held to be of the issue in the record, and the Court will not review the award on the ground that the referee has given effect to a conclusion no objection to the competency of which was stated on record.[1]

**Powers and Duties of Referee.**—The referee usually accepts the reference by a minute or a docquet on the minute of reference, though formal acceptance is not absolutely essential, the fact that the referee acts under the minute of reference being a sufficient acceptance. The referee, if he considers it expedient, may, and usually does, appoint a clerk. The duty of the referee is to fairly consider the question or questions referred to him, to exhaust but not exceed the reference. His decision must therefore "exhaust the reference," in the sense that it must embrace everything that is involved in the question in controversy which is submitted to him. His award must decide both facts and law,[2] and it must determine both the merits of the action and the question of expenses.[3] The determination of the questions as to what pleadings may be necessary, and of their form, is a matter exclusively within his discretion. He may allow any amendment of the pleadings which he thinks reasonable and proper, provided it does not go beyond the scope of the questions submitted to him, and he may alter, or allow a party to alter, the pleadings before him, but he cannot alter the contract of reference.[4] He has also exclusive power to determine what proof is admissible, and to decide its effect.[5] He has power to allow a proof without special authority,[6] and he may award expenses though the question of expenses has not been specially referred to him.[7] In certain kinds of reference his own inspection is the proper kind of inquiry.[8] He may therefore order pleadings, in which case the ordinary forms in use in the Court will usually be followed; or he may confine himself to appointing each party to give in a written claim, stating (without argument) the facts they aver and the claim or demand they make. If he think fit, he may allow the parties to

[1] Roberts *v.* Roberts, 1833, 12 S. 210.

[2] Welch *v.* Jackson, 1864, 3 M. 303.

[3] Hilton *v.* Walker, 1867, 5 M. 969.

[4] Brown's Trs. *v.* Horne, 1907, S.C. 1027, *per* Ld. Kinnear.

[5] Mowbray *v.* Dickson, 1848, 10 D. 1102; Miller *v.* Millar, 1855, 17 D. 689.

[6] Berry *v.* Watson, 1827, 6 S. 256. Berry *v.* Watson, *sup.*; Ferrier *v.* Alison, 1845, 4 Bell's Ap. 161.

[8] Campbell *v.* Campbell, 1843, 5 D. 538; Mowbray *v.* Dickson, *sup.*; Miller *v.* Millar, *sup.*

answer their opponents' claim, or he may allow each party to revise his claim after he has seen that of the other.[1] So much is the matter of proof within his discretion, that he is not bound to allow or take proof even where, prior to the remit, it has been ordered by the Sheriff.[2] If the reference have been made to him as a man of skill, he may competently decide the question of his own knowledge, after examining the subject of dispute;[3] and if he examines witnesses on matters in which he is himself skilled, he need not examine them on oath.[4] If, however, it is necessary that he should examine witnesses on matters with reference to which he is not specially skilled, he should, unless the parties consent to dispense with the formalities, examine them on oath, and according to the ordinary rules which obtain in Court. But in this as in other matters he is entitled to use his discretion.[5] Though the referee's discretion is practically absolute, it must always be exercised with the strictest impartiality and fairness. The referee's award cannot be reviewed by the Court on its merits,[6] and so long as he acts impartially and conscientiously the Court will not interfere with his award or examine the procedure which he has seen fit to adopt.[7] The Court will not therefore interfere with the award, unless in such exceptional cases as where he has omitted to order pleadings in a case in which it is impossible to do justice in their absence,[8] or where he has heard one party without hearing his opponent or affording him an opportunity of being heard. It is, however, for him in the exercise of his discretion to decide whether there shall or shall not be a proof, and it is entirely in his option to say how often, when, and in what manner he will hear the parties. He may thus in his discretion hear the parties by themselves, or he may sanction the employment of agents or even of counsel to appear for them, and he may direct that the arguments submitted to him shall be either oral or in writing. He may, and in practice not infrequently does, hear what the parties have to say at the end of a proof or inspection, and such a hearing is usually

[1] Bell on Arbitration, p. 274.

[2] Colquhoun *v.* Haig, 1825, 3 S. 424.

[3] Johnstone *v.* Cheape, 1817, 5 Dow 247; M'Donald *v.* M'Donald, 1843, 6 D. 186.

[4] Cochrane *v.* Guthrie, 1861, 23 D. 865.

[5] *See* Kirkcaldy *v.* Dalgairn's Trs., 16th June 1809, F.C.

[6] Hilton *v.* Walker, 1867, 5 M. 969.

[7] Robertson *v.* Davidson, 1833, 11 S. 659.

[8] *Cf.* Mitchell *v.* Cable, 1848, 10 D. 1297.

sufficient. He cannot, however, pronounce an award merely on the ground of default, as for non-implement of an order to consign; but where it is obvious that the conduct of a party is such as to show that his object is to hang-up the reference, the referee may, after giving the parties due notice, decide the case as it stands.[1] When necessary, in the interests of justice, he has power to invoke the assistance of persons of skill,[2] and for the fees of such persons the parties are liable.[3]

**Issue of Award.**—It is both customary and proper (though not absolutely essential) that notes of the intended decision should be issued, and an opportunity afforded the parties of expressing their views upon them either verbally or in writing, before the award itself is actually pronounced. Once the award is actually issued[4] by the referee, it cannot be recalled or altered by him. Only in very exceptional cases the Court will look at the notes in reviewing the award.[5] The actual award or final report is lodged in process, and the case is returned to the Sheriff-Clerk. The award is not, however, binding until judicial authority has been interponed to it. Accordingly, after the award has been duly lodged the Court grants decree in accordance with its terms, such decree being absolutely necessary to give effect to the award.[6] The Court cannot, however, amend or alter the award, though, as will be seen, in certain circumstances it may quash it. Should alteration or amendment of the award become necessary, owing to a change of circumstances or otherwise, the Court will remit to the referee to make the necessary alteration or amendment. But the referee may often conveniently state alternative forms, if his award depends on a question of law which it is expedient the Court should decide.[7] Similarly, if the report is ambiguous in its terms, or incomplete in respect of the omission of a necessary step of procedure, or if it does not truly exhaust the reference, the Court may remit it back to the referee for amendment, alteration, or correction in his discretion.[8] But it is essential that

[1] George *v.* Milne, 1836, 14 S. 404.

[2] Cal. Rly. *v.* Lockhart, 19 D. 527; *affd.* 1860, 3 MacQ. 808.

[3] M'Leod *v.* Bisset, 1825, 4 S. 335.

[4] *See* Macrae *v.* Edin. Street Tramway Co., 1885, 13 R. 265; Scott *v.* Scott & Watson, 1898, 5 S.L.T. 294 (O.H.).

[5] Mackenzie *v.* Girvan, 3 D. 330, *per* Ld. Moncreiff; Brackenrig *v.* Menzies, 1841, 4 D. 285.

[6] Gillon *v.* Simpson, 1859, 21 D. 243.

[7] Mackay's Manual, p. 283.

[8] Ld. Adv. *v.* Heddle, 1856, 18 D. 1211.

the actual award should be that of the referee, and not of the Sheriff.

**Process depends in Court during Reference.**—The process continues to depend in Court notwithstanding the reference. Thus diligence on the dependence continues in force, and necessary motions in the cause may be made to the Sheriff while the case is before the referee. A judicial reference does not, like an ordinary submission, fall by the death of a party to it, but transmits against his representatives. A motion, therefore, is competent to the Sheriff to compel the referee to transfer the cause against the representatives of a party deceased,[1] as is one to compel him to sist a new party. Similarly motions for warrant to cite witnesses or havers may competently be made by either party, or the referee or both, after the reference has been entered into.[2] From the fact that the cause continues to depend before the Court, it follows that only such agents as are entitled to appear before the Sheriff can competently appear before the referee;[3] and for the like reason it would appear that notwithstanding the reference the cause may fall asleep if no order is timeously made by the referee, and that if the process has fallen asleep while before the referee, no further step can competently be taken until it has been awakened by the Court.[4]

**Failure of Reference.**—The reference falls by the refusal of the referee to accept or to proceed with the reference. It also falls by the death of the referee or by the recall of his appointment by the Court. Once the reference falls, the whole procedure which has taken place under it is rendered nugatory, and the process reverts to the position in which it was prior to the motion for the reference being made. The parties may of course agree to adopt a course which may, partially or wholly, obviate the necessity of the procedure becoming abortive.

**Challenge of Award.**—The award may be challenged on grounds similar to those on which a decree-arbitral may be impugned. Before interponing authority to the award, the Sheriff should allow parties an opportunity of seeing and considering it, in order that they may, if so advised, lodge any relevant objections.

[1] Watmore *v.* Burns, 1839, 1 D. 743.

[2] Dickson on Evidence, s. 1898; Bell on Arbitration, p. 276.

[3] Ireland *v.* Wilson, 1851, 13 D. 1226.

[4] *See* Watson *v.* Stewart, 1872, 10 M. 494; Mackay's Manual, p. 282; Bell on Arbitration, p. 282.

Such objections, to be relevant, must aver a specific case of irregularity or incompetency of the proceedings before the referee. Thus the award may be relevantly challenged on the grounds—(1) Of falsehood, bribery, or the legal (though not necessarily the moral) corruption of the referee. Legal corruption has been defined as any plain failure in duty, distinct from a mere error of judgment, in deciding the merits of the reference.[1] (2) That the award does not exhaust, or that it goes beyond the reference. If the award does not exhaust the reference the Court will remit it back to the referee for correction. Unless power to issue an interim or partial award is expressly conferred on the referee, it is doubtful whether he possesses power to issue any award other than one which is final and complete.[2] Where the award is *ultra fines compromissi*, the Court will not set aside the whole award if the erroneous part is separable from the remainder. If, however, the award as a whole and inseparable goes beyond the scope of the reference, the Court will set it aside as wholly invalid.[3] (3) That the referee has so departed from the rules of law or equity as to make his conduct tantamount to a denial or miscarriage of justice. Neither error in law nor in fact are *per se* grounds for reducing the award.[4] But it is an implied condition in all references that the referee will act in accordance with plain equity, with strict impartiality, and with an honest desire to mete out evenhanded justice between the parties. Therefore in such cases as where the referee decides the cause without reference to the proof,[5] or after hearing one party while refusing to hear the other,[6] or where he refuses to allow a proof which is manifestly necessary,[7] or where he refuses to hear parties in a case which is not referred to him solely as a man of skill,[8] the Court will set aside the award, though whether it will do so on the ground that such conduct on the part of the referee amounts to corruption, or to a breach of the implied

[1] Mitchell *v.* Cable, 1848, 10 D. 1307, *per* Ld. Mackenzie; Miller *v.* Millar, 1855, 17 D. 689; Hilton *v.* Walker, 1867, 5 M. 969.

[2] *See* Bell's Lects. on Conveyancing, i. 361.

[3] Kidd *v.* Paterson, 19th June 1810, F.C.; Reid *v.* Walker, 1826, 5 S. 130; Napier *v.* Wood, 1844, 7 D. 166.

[4] Adams *v.* G. N. of Scot. Rly., 1889, 16 R. 843.

[5] Mitchell *v.* Cable, 1848, 10 D. 1297.

[6] E. of Dunmore *v.* M'Inturner, 1835, 13 S. 356.

[7] Sharpe *v.* Bickerdyke, 1815, 3 Dow 102.

[8] Lyle *v.* Neilson, 1844, 6 D. 1163; *see* Flounders *v.* Flounders, 1826, 4 S. 464.

conditions inherent in all references, is not quite clear.[1] But where it is not averred that there has been improper conduct on the part of the referee or that he has acted *ultra vires*, the fact that he has erred in point of law by rejecting evidence clearly relevant will not justify the Court in reviewing his decision.[2] Competent objections to the award do not require a reduction, but may be stated in opposition to the motion for decree in accordance with its terms.[3]

**Expense of Reference.**—The referee, as an officer of Court, is entitled to remuneration, the amount of which is fixed by the Court, usually after a remit to the Auditor.[4] The Clerk to the reference, who is equally an officer of Court, is also entitled to remuneration, the amount of which may be fixed by the referee, but is usually left to the Court to decide. When the reference contains no provision as to the payment of the expenses incurred, the parties are liable jointly and severally for the fees of the referee and the Clerk, and it is within the referee's power to determine which party shall be liable for such fees.[5] In one case where the referee left the proportion of the amount of his fee payable by the parties to the decision of the Court, the Court remitted the matter back to the referee to fix the proportions.[6] If one of the parties pay the whole, he may recover half from the other.[7] The referee and the Clerk to the reference are each entitled to appear and crave decree for their fees in their own names against both parties to the action, jointly and severally.[8] The question of the expenses of the reference should be decided by the referee along with the merits, and he has power to deal with the question of expenses, though not specially referred to him, where such a power is not clearly excluded by the terms of the reference.

[1] *See* opinions of the Judges in Mitchell *v.* Cable, *sup.*; *see also* Mackenzie *v.* Girvan, 1840, 3 D. 328, *per* Ld. Moncreiff; Wauchope *v.* Edin. & Glas. Rly., 1846, 8 D. 816; Alexander *v.* B. of Allan Water Co., 1869, 7 M. 492.

[2] Edin. Water Trust *v.* Clippens Oil Co., 1902, 4 F. (H.L.) 40; Rogerson *v.* Rogerson, 1885, 12 R. 583.

[3] Mackenzie *v.* Girvan, *sup.*

[4] Henderson *v.* Paul, 1867, 5 M. 613, 628.

[5] Henderson *v.* Paul, *sup.*; Beattie, 1873, 11 M. 954.

[6] Morris *v.* Stewart, 1852, 14 D. 501.

[7] Edin. Oil Gas Co. *v.* Clyne's Trs., 1835, 13 S. 413; Drummond v. Leslie 1835, 13 S. 684.

[8] Beattie, *sup.*

### III. Reference to Oath

**Generally.**—Prior to the Evidence Act of 1853, the only way in which a party to a cause might competently obtain the evidence of his opponent with reference to the question in dispute between them, was by a reference to such party's oath. That Act, however, removed that disability by making it competent for a party to adduce his opponent as a witness in the cause, but declared that the right of a party to refer the matter to the oath of his adversary should remain as formerly, under the reservation that where either party has been examined as a witness *in causa*, it should not be competent thereafter to refer the matter to his oath. At any stage of the cause, so long as it remains *sub judice*, either party has the right, and may elect, to refer the whole matter in dispute, or any particular part of the question in controversy, to the oath of his opponent, on the equitable principle that however just a claim or a defence may appear *ex facie* of the documents or the evidence adduced, no person ought to be permitted to establish a claim or a defence which is not ultimately approved by his conscience as founded on justice. Such a reference is of the nature of an *ultimum remedium*, and is therefore final as regards the matter to which it refers. If the oath be positive of the reference the proof in regard to it is complete, no other evidence of any kind or description being necessary; if negative, the party making the reference is held to have finally failed to establish the matter referred. This result is due not to the intrinsic superiority of such a mode of probation, but to the fact that such a reference constitutes a judicial contract between the parties, whereby the referrer is held to have bound himself to cast the burden of proving the whole cause, or the particular matter referred, on the result of the reference to his adversary's oath. So binding, indeed, is this contract held to be, that no evidence of any kind whatever is admissible to contradict or impugn the testimony of the party to whose oath reference is made. Even proof that such party has in his oath been guilty of perjury, though it might subject him to a criminal prosecution, will not be permitted to qualify the effect of his testimony on oath. The reference is, however, so far an appeal to the equitable jurisdiction of the Court, that it remains within the discretion of the Court to grant it or not

But such discretion will be exercised to refuse the reference only when it appears that to permit it would defeat the ends of justice or would directly tend to prejudice the interests of third parties. Thus, where the Court was of opinion that the interests of a third party, who was not a party to the cause, would be seriously prejudiced in the event of the reference proposed proving to be affirmative of the matter referred, it refused to allow the reference.[1] And such a reference has been refused where the party to whose oath reference was sought to be made was abroad, and it was apparent that the sole object desired was the obtaining of delay. In such cases the Court may, instead of refusing the reference, allow it, subject to the consignation of the amount in dispute[2] or of expenses.[3]

**When competent.**—A reference to oath is competent not only in actions in which such a mode of probation is the only competent evidence, but in every action in which a party elects to cast the burden of proof upon the oath of his adversary. To make a reference to oath competent, there must, however, in the first place, be a competent process.[4] Thus a reference is incompetent in an action which is not relevant,[5] and it is immaterial that the defect in relevancy is due solely to want of sufficient specification.[6] On similar grounds, averments which, as not pertinent to the issue or germane to the ground of action, are inadmissible to probation, cannot be made the subject of a reference to oath.[7]

**What may be referred.**—Matters involving a question of law cannot be referred to oath, a reference to facts only being permissible. Thus a reference to the oath of a defender whether a sum in dispute is *due*, is permissible, that being solely a question of fact; but conversely, a reference of the question whether the sum is *justly* due, or whether the defender is *jointly* due with some one else, being questions not of fact, but of law, is not permissible. Similarly, a reference as to whether or not a party has been relieved of an

[1] Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H.L.) 144.

[2] Pattinson *v.* Robertson, 1846, 9 D. 226.

[3] Aikman *v.* Aikman's Trs., 1868, 6 M. 277.

[4] M'Farlane *v.* Watt, 1828, 6 S. 1095; Sawers *v.* Clark, 1892, 19 R. 1090.

[5] Sawers *v.* Clark, *sup.*

[6] Phœnix Fire Ins. Co. *v.* Young, 1834, 12 S. 921.

[7] Thomson *v.* Simpson, 1844, 7 D. 106.

obligation of guarantee is incompetent.[1] The facts as to which reference is permissible are such only as are relevantly averred on record. Thus facts not relevant to infer an obligation will not be referred to oath. But a general reference to the verity of the grounds of action, or of the defence as contained in the record, will be allowed. Where in one case a reference was to the oath of the pursuer of the whole matters at issue in the cause, the Court refused to sustain the reference, on the ground that there was no statement on record sufficiently specific.[2] Where the record contains mixed questions of law and fact, the reference will be made only to the special matters of fact in issue,[3] and where this cannot be easily effected, and the reference is general, the oath will be held conclusive only as to the matters of fact.[4] Matter which may be made the subject of a criminal indictment cannot, if the referee object, be referred to his oath. Thus the defender in an action of damages for assault, in respect of which he might be imprisoned, may decline a reference of the matter to his oath.[5] But if the offence be one for which imprisonment is either incompetent or is in practice not usually awarded, the reference will, in general, be sustained.[6] A party who means to avail himself of the privilege of declining must plead it when the reference is proposed, since if he do not do so the reference will proceed.[7] It has been doubted whether it is competent to refer matters of which the referee cannot personally know anything; but the doubt does not appear to be well founded. Though the party himself may not have knowledge of the matter, he may have received such information as may have quite satisfied him that his claim or defence was unfounded; and though his adversary may not have legal evidence to defeat him, it would be unfair to lay down any general rule to prevent an appeal to his conscience.[8]

**Reference may be General or Special.**—The reference is either general or special, according as the matter referred is the

[1] Taylor *v.* Hall, 1829, 7 S. 565; Conacher *v.* Robertson, 1829, 8 S. 141; Broom & Co. *v.* Edgely, 1843, 15 Jur. 436; Finlay *v.* Outram, 1851, 24 Jur. 10.

[2] Phœnix Fire Ins. Co. *v.* Young, *sup.*

[3] Taylor *v.* Hall, *sup.*

[4] *See* Anstruther *v.* Wilkie, 1856, 18 D. 405.

[5] Miller *v.* Brown, 1828, 6 S. 561.

[6] M'Callum *v.* M'Call, 1825, 3 S. 551; Dickson on Evidence, s. 549.

[7] Conacher *v.* Conacher, 1859, 21 D. 597.

[8] Dove Wilson, p. 299.

whole question in controversy between the parties or of any individual fact or facts involved in the case. A reference to the oath of a party may competently be made after parole proof has been adduced, or even after a final decision upon the merits. Before the cause is concluded by a final decision upon the merits, it is competent to refer any particular facts which do not exhaust the question, and to prove others *aliunde*.[1] Even after proof has been led, a party may ask for judgment upon the facts he has proved, and refer the remainder of the case to the oath of his opponent.[2] But after a final interlocutor, the reference can only be general, that is, it must embrace the whole cause or matter decided, or at least such parts of it as will be conclusive, and not merely such partial facts as may lead to a renewed discussion relative to that matter.[3] Thus, suppose a case in which there are several independent pleas, one of which if established is conclusive of the action, that a proof of that plea is allowed, and that as a result of that proof a final interlocutor is pronounced. If thereafter the losing party desires to refer the cause to his adversary's oath, he must refer the whole matter on which judgment has been pronounced. But he is not compelled also to refer the facts on which his other pleas are founded, and which did not form the subject of decision. So, likewise, where the action consists of several independent claims, some of which have formed the subject of judicial decision, in referring the cause to his adversary's oath a party is not bound to refer the whole of these claims, some of which may have been decided in his favour, but only the whole issue as to any particular and separate claim.[4]

**Time of Reference.**—While it is a general rule that a reference to oath of the whole cause or issue is admissible at any time before issue of the extract,[5] and even after extract of a decree on the merits if the cause has not finally been disposed of by a decerniture for expenses,[6] it is improper (at least in the face of objection) to sustain

[1] Moore *v.* Young, 1842, 5 D. 494.

[2] Cameron *v.* Armstrong, 1851, 13 D. 1256.

[3] White *v.* Murdoch, 9th June 1812, F.C.

[4] Sinclair *v.* M'Beath, 1869, 7 M. 934; White *v.* Murdoch, *sup.*; Moore *v.* Young, 1842, 5 D. 494; Broom *v.* Edgely, 1843, 5 D. 1087; Sawers *v.* Clark, 1892, 19 R. 1090.

[5] Aikman *v.* Aikman's Trs., 1868, 6 M. 277.

[6] Drew, 1855, 27 Jur. 406; *see* Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H.L.) 144.

a reference before the record is closed and the relevancy of the action determined, since before these steps are taken it is impossible to determine whether the process is such as to make the reference competent. There can be no reference to oath in an action which is not relevant.[1] While at one time it was not uncommon to refer the summons alone,[2] it may be assumed that under present practice the referee has a right to insist that before a reference to his oath shall be sustained the record must first be closed,[3] though where the right is used arbitrarily and without reasonable necessity he may be found liable in the expenses of the proceeding. Where preliminary pleas are stated, they must be disposed of *ante omnia*, and it is absolutely incompetent to refer to oath until they have been determined. Where such pleas are stated by way of defence, the defender cannot refer to the pursuer's oath under reservation of them,[4] and if the party, whether pursuer or defender, who states such pleas make a reference before they have been disposed of, he will be held to have departed from them. Similarly, if the referee have stated such pleas and he appear and depone under the reference, he will be held to have waived his objections.[5] Where the evidence of a party, to whose oath his adversary desires to refer, is in danger of being lost, it would appear to be competent to take his deposition on oath to lie *in retentis*, to await the disposal of any preliminary pleas which he may have stated.[6] A reference is competent whether the party desiring to refer has led proof or has renounced probation.[7] If, however, a party has examined his opponent as a witness *in causa*, he cannot afterwards refer to his oath.[8] This rule holds where the opponent has tendered himself as a witness in support of his case, and has been cross-examined by the party desirous of making the reference.[9] But the rule is subject to the reservations (1) that where the action embraces two or more distinct and separate claims, a party may examine or cross-examine his opponent with reference to one or some of these claims, and refer to his oath with regard to

[1] Sawers *v.* Clark, 1892, 19 R. 1090.
[2] Stair iv. 38, 27.
[3] Riley *v.* M'Laren, 1853, 16 D. 323.
[4] Henderson *v.* Smith, 1852, 14 D. 583.
[5] Turnbull *v.* Borthwick, 1830, 8 S. 735.
[6] *See* Riley *v.* M'Laren, 1853, 16 D. 323; Crawford *v.* Wingate & Co., 1842, 4 D. 903; Act, Rule 63. *See supra.*
[7] Anstruther *v.* Wilkie, 1856, 18 D. 405.
[8] Evidence Act, 1853, s. 5.
[9] Maclay *v.* Campbell, 1876, 3 R. 999.

the remainder;[1] and (2) that if it turn out that a proof in the course of which a party is examined is incompetent, a reference to his oath is, notwithstanding, competent.[2] Reference to oath is not competent after the cause has been referred to a judicial referee.[3]

**To whose Oath Reference made.**—The reference is competent only to the oath of the opposing party;[4] and while it operates as a bar to any new process upon the same interest and cause of action, it does not affect third parties who have not sanctioned it.[5] To this rule there is, however, the exception, that an arrestee may refer his defence against the arrester to the oath of the common debtor, by whose oath the arrester will be bound.[6] As a bankrupt is absolutely divested of his estate by the Act and warrant in favour of his trustee, and as interest in the question is the necessary qualification for such an oath,[7] it is incompetent in a question with his creditors to refer to the bankrupt's oath with the object of subjecting the estate, though he may competently be adduced as a witness, and examined in order to elucidate any matter which may be obscure.[8] The admission of one co-obligant or co-creditor, on a reference to his oath, does not bind the others; nor will the remaining co-obligants or co-creditors be bound by a deposition in a reference made to both by one of their number.[9] But in a cautionary obligation, where the obligation of the cautioner is accessory or ancillary to that of the principal obligant, and therefore stands or falls with it, the rule appears to be that the cautionary obligation may be affected either by the oath on reference (or by the reference to oath), made by the principal debtor.[10] As interest is the qualification, a reference to the oath of any one who is manager or *præpositus*, relative to any matters falling within his management and with regard to the facts of which he is solely cognisant, is competent. Thus the oaths of wives *præpositi rebus domesticis* bind their husbands with reference to such matters[11]; those of trustees or

[1] Dewar *v.* Pearson, 1866, 4 M. 493.

[2] Swanston *v.* Gallie, 1870, 9 M. 208.

[3] M'Larens *v.* Shore, 1883, 10 R. 1067.

[4] Farquhar *v.* Farquhar, 1886, 13 R. 596.

[5] *See* Longworth *v.* Yelverton, 1865, 3 M. 645; 1867, 5 M. (H.L.) 144.

[6] Ersk. iii. 6, 16.

[7] Farquhar *v.* Farquhar, *sup.*

[8] Adam *v.* M'Lachlan, 1847, 9 D. 560; Thomson *v.* Duncan, 1855, 17 D. 1081.

[9] Tait on Evid., 258; Dickson on Evid., 1448.

[10] Tait on Evid., 258; Dickson on Evid., 1448.

[11] Mitchells *v.* Moultrys, 1882, 10 R. 378.

managers for others, or the references to oath made by them, in the administration of the matters entrusted to their care, bind their constituents; and the oaths of magistrates, though *functi officio*, to prove contracts made by them while in office, bind their corporations. But where, as in the case of the triennial and sexennial prescriptions, the proof is statutorily limited to the writ or oath of the debtor or party, a reference to the oath of an agent or manager is incompetent.[1] In general a partnership debt cannot be referred to the oath of one of several partners, and therefore in an action against a company a reference to the oath of one of the defenders, unless he happens to be manager of the company and appears from the record to have been directly concerned in the transaction in question, is incompetent.[2] In the case of an assignation, while prior to intimation the assignee is bound by the cedent's oath, after intimation the cedent's oath is inadmissible to prove compensation, payment or other direct defence against the debt.[3] But to this rule there are the following exceptions: (1) Where the assignation has been gratuitous or in trust for the cedent; (2) if the assignation, though onerous, have been made after the subject of it has become litigious by an action (not mere citation) at the instance of the debtor against the cedent, on the same grounds on which the debtor afterwards disputes the assignee's claim; (3) if the assignee has followed out diligence commenced in the name of the cedent; and (4) if compensation against the cedent have been proved *scripto*, and the assignee pleads recompensation in the person of the cedent, the cedent's oath is admissible against the assignee to elide the plea of recompensation—upon the principle that the ground of recompensation is still in the person of the cedent unassigned.[4] A reference is competent to the representatives or trustees of a deceased party.[5]

**Mode of referring.**—A party who desires to refer to the oath of his adversary must lodge a minute to that effect, which may be signed by himself or his agent.[6] Where it is signed and tendered by the agent, he must have his client's mandate specially authorising

[1] Bertram *v.* Stewart's Trs., 1874, 2 R. 255.

[2] M'Nab *v.* Lockhart, 1843, 5 D. 1014; Broom & Co. *v.* Edgley, 1843, 5 D. 1087.

[3] Campbell, 1860, 23 D. 159.

[4] Ersk. iii. 5, 9, 10, iv. 2, 10; Stair, iii. 1, 18, iv. 44, 8; Bell's Dict., p. 418.

[5] Kelly, 1864, 37 Jur. 27, *per* Ld. Deas.

[6] Act, Rule 64; A. S. 10th July 1839, s. 84.

him to do so. According to former practice, if through some mistake the minute was omitted, such omission was not fatal to the reference if all other necessary forms had been attended to, and the intention of the party to refer was clear from some such distinct act as his presence at the examination.[1] Now, however, it would appear, from the terms of the Act, that the lodging of the minute is a necessary prerequisite. The minute contains a reference of the whole cause or of the particular fact or facts in dispute, either stated shortly or referred to as contained in a particular article of the condescendence or answers, and craves that the authority of the Court may be interponed thereto. The Sheriff then interpones his authority to the minute by interlocutor, and appoints a diet for taking the oath. Without judicial interposition, there can be no reference.[2] All objections to the competency of the reference should be stated and repelled before the oath is taken, and therefore should be stated to the Sheriff when the order is asked. Objections not stated before the authority of the Sheriff is interponed to the minute will be held to be waived.[3]

**Retracting and Deferring the Reference.**—At any time before the oath is emitted the reference may be retracted by the party referring, on payment of the expenses incurred by his opponent owing to this change of procedure. It will not, however, be permitted without sufficient reason, nor under circumstances prejudicial to the referee, as for example where there has been great delay, or he has been deprived by death or otherwise in the interval of a material witness.[4] Deferring is a proceeding now almost unknown, by which a party to whose oath a reference has been made declines it and refers it back to the oath of his adversary. The proceeding is still, it would appear, competent, and it is regulated in the same way as the original reference. The Sheriff has a discretionary power, and it will not be allowed unless it appear that the person deferring cannot himself depone in the matter with distinctness; in which case the Sheriff may ordain that that

[1] Hewit *v.* Pollock, 1821, 1 S. (O.E.) 167; A. S. 1839, s. 84.

[2] Nicholson *v.* Macleod, 23rd Nov. 1810, F.C., *per curiam.*

[3] Broom & Co. *v.* Edgley, 1843, 5 D. 1087.

[4] Chalmers *v.* Jackson, 18th Feb. 1812, F.C.; Bennie *v.* Mack, 1832, 10 S. 255; Dick *v.* Hutton, 1876, 3 R. 448; Galbraith *v.* M'Neil, 1828, 7 S. 63; Dove Wilson, p. 304; M'Glashan, s. 1361.

party, who in his opinion has the best opportunity of knowing the facts, shall make oath.[1]

**Procedure at Examination.**—The oath is a deposition, and may therefore be taken before the Sheriff or a Commissioner, and may be recorded by the Sheriff or by the Commissioner, or by a Clerk or shorthand writer nominated by the Sheriff or the Commissioner, to whom the oath *de fideli* is administered. It may be recorded in narrative form or by question and answer, as the Sheriff or the Commissioner sees fit to direct, and the extended notes, certified by the Clerk or shorthand writer, form the deposition. The Sheriff or the Commissioner may, if he think fit, dictate to the Clerk or shorthand writer what he is to record.[2] The deponent is put on oath or makes an affirmation in the usual way, and the examination proceeds at the instance of the party referring, who may ask any relevant questions he pleases, under the reservation that after answering general questions the deponent is at liberty to decline to answer special questions—a power given him to prevent his being led to perjure himself by answering general questions in the negative, and then being obliged to admit circumstances which contradict his negative.[3] The party conducting the examination should therefore be careful to begin his examination by putting special questions, and to end it by asking those which are general. But after a general question and answer exhausting the reference, should special interrogatories be put and answered without objection, it is competent to look at the answers and to give effect to them in interpreting the oath.[4] Documents may be made part of the oath on reference, but in order to do so the party must be specifically examined on these matters; once that is done it is not necessary to engross the whole documents, a reference to them being sufficient.[5] It is therefore competent to show to the deponent any documents which would be admissible were he being examined as a witness, and to examine him in regard to their contents, though the Court cannot consider such documents with the view of contradicting the deponent's oral testimony.[6] It is also competent to refer him to his former deposition as a haver, and to excerpts from books then

[1] Ersk. iv. 2, 8; Stair, iv. 44, 13; Tait's Evid., 237.

[2] Act, Rule 65.

[3] Heddle *v.* Baikie, 1841, 3 D. 370.

[4] Tait's Evid., p. 239; Heddle *v.* Baikie, *sup.*

[5] Jackson *v.* Cochrane, 1873, 11 M. 475.

[6] Boyd *v.* Kerr, 1843, 5 D. 1213; Blair *v.* M'Phun, 1856, 18 D. 1202.

shown to him.[1] An unstamped document, which because of the want of the stamp cannot be founded on, may nevertheless be shown to the deponent, not for the purpose of rearing it up as an obligation, but merely for the purpose of refreshing his memory, or perhaps stimulating his conscience.[2] The examining party is at liberty to stop the examination when he pleases. At the close of the examination the Sheriff may, either *ex proprio motu* or on the suggestion of the deponent's agent, put such questions as he may deem necessary to clear up any doubtful point.[3] Though according to previous practice the deponent's agent was permitted to cross-examine his client,[4] in accordance with more recent judicial decision such a course is not now permissible.[5] But the Sheriff is bound to hear any statement volunteered by the deponent in reference to his oath, as it is of the essence of such a mode of investigation that the fullest opportunity should be given to the deponent to tell his own story. Anything like judicial refusal to hear what the deponent has to say, even if it be not in answer to questions put by his adversary, but by way of explanation coming from himself, is, or may be, so fatal to the proper understanding of his deposition as to fall within the category of objections for which the Court will be bound to give redress.[6] The deponent, it may be mentioned, is entitled to have an agent present, not only for the purpose of suggesting questions to the Sheriff, but also for the purpose of assisting his client with references to documents, and of objecting to incompetent questions.[7]

*Re-examination* is in certain cases permissible, as where the examination has not exhausted the reference;[8] where the deponent has not been examined in regard to certain statements in his record which it is desired to read along with his deposition;[9] where the deposition is confused or ambiguous;[10] or where, through some irregularity, the deposition has been emitted in the absence of the

[1] Boyd *v.* Kerr, *sup.*; Blair *v.* M'Phun, *sup.*

[2] Hunter *v.* Geddes, 1835, 13 S. 369; Craig *v.* Thomson, 1824, 4 S. 668.

[3] Soutar *v.* Soutar, 1851, 14 D. 140.

[4] M'Dougall *v.* M'Laren, 1881; Sellar's Forms, i. 278.

[5] Heslop *v.* Runcie, 1894, 22 R. 83; Cowie's Exr. *v.* Paterson, 1904, 7 F. (J.) 68.

[6] Cowie's Exr. *v.* Paterson, *sup.*, per Ld. Stormonth Darling.

[7] Blair *v.* M'Phun, *sup.*

[8] Paterson *v.* Thomson, 1830, 8 S. 571.

[9] Young *v.* Pollock, 1832, 10 S. 570.

[10] Ersk. iv. 2, 15.

referring party.[1] The right to permit a re-examination is entirely in the discretion of the Sheriff, and where the oath is clear and particular re-examination will not be permitted under any pretence. Where the oath is made in general or doubtful terms, particular interrogatories may, on re-examination, be put to the deponent, but it is incompetent to examine him on any special fact which may involve him in perjury.[2] Where a party in his oath refers to documents not in process as a ground of his deposition, he thereby makes them part of his deposition, and the examining party is therefore entitled to their production. In the event of any inconsistency existing between such documents and the terms of the oath, the deponent is bound on re-examination to explain it.[3] Whatever explanation the deponent may give must be accepted in the process as true.[4]

**Failure to attend Examination.**—If the party to whom the reference is made fail to attend the examination he may be held as confessed, the effect of which is the same as if he had appeared and admitted the matters referred.[5] The Act makes no provision for the case of the referring party failing to appear, but in such a case the proper course would appear to be to dismiss the reference. Under previous practice a party might be reponed against a decree holding him as confessed in respect of his failure to attend the examination,[6] but the Act of 1907 makes no provision on the subject.

**Construction of the Oath.**—Once the oath has been emitted the sole question is, not *quid verum sed quid juratum est*, not whether the oath be true or false, consistent with or contradictory of other statements made by the deponent, whether on record or in other writings or documents, but what as a matter of fact the deponent has actually deponed to. Where the oath is explicit it is final and conclusive of the matter referred. Where, however, it is not precise or decisive, and is ambiguous or contradictory, its true meaning will be interpreted by the Court. In the construction of the oath, questions of some nicety arise as to what are called the intrinsic and extrinsic qualities of the oath. Qualifications which cannot be separated from the fact sworn to are intrinsic of the oath,

[1] Peacock *v.* Smiles, 1828, 6 S. 1081.

[2] Ersk. iv. 2, 15.

[3] Young *v.* Pollock, *sup.*; Thomas *v.* Dumbreck, 1824, 4 S. 668.

[4] Newlands *v.* M'Kinlay, 1885, 13 R. 353.

[5] Act, Rule 64.

[6] A. S. 1839, s. 82; *see* Grant *v.* M'Gregor, 1839, 1 D. 1048.

while those which are separable are extrinsic. Thus, if the constitution of a debt be referred to the defender's oath, every quality or addition adjected by him to the constitution is intrinsic, because it is *pars ejusdem negotii*. For example, if the deponent admits the receipt of money, but swears it was given him in payment of a debt or upon certain conditions, the addition is intrinsic of the oath, and must be accepted as part of it. It is, however, sometimes a matter of some difficulty to determine whether a matter deponed to really forms part of the matter embraced by the reference, or whether it relates to something extraneous. In ascertaining, therefore, whether a quality is intrinsic or extrinsic of the oath, the exact terms of the reference must be carefully scrutinised. The matter may be best understood by a consideration of examples of judicial decision. Thus, if the deponent swear that he promised to pay a sum of money conditionally, the condition cannot be separated from the promise, and is therefore an intrinsic quality of the oath. So, where a party who was sued for his account by a solicitor, deponed on a reference to his oath that he employed the pursuer, but on the express condition that he was to look to the opposite party for his recompense, the qualification was held to be intrinsic of the oath, and therefore negative of the reference.[1] If, on the other hand, the deponent, while admitting the existence of a debt, swears that it has been compensated by a counter-claim, the counter-claim is extrinsic of the oath, because compensation, though a valid defence, must be established by other evidence than the oath of the party pleading it.[2] Similarly, where a reference was made to a debt contained in a prescribed bill, the deposition that the bill was granted in respect of smuggled goods was held to be extrinsic of the oath, as such an averment was one that resolved itself into ground of challenge of the bill, which required to be supported by independent proof.[3] Again, where a debt not constituted by writing is referred to the oath of the defender, and while admitting the constitution of the debt he swears that it has been paid, the quality of payment is intrinsic, and must be deemed part of the oath, and therefore the oath will be deemed negative of the reference.[4] So, where in an

[1] Knox *v.* M'Caul, 1861, 24 D. 16; *but see* Taylor *v.* Forbes, 1853, 24 D. 19.

[2] Thomson *v.* Duncan, 1855, 17 D. 1081.

[3] M'Neill *v.* M'Kissock, 28th Feb. 1805, M. App. Oath; Gaylor, 1854, 27 Jur. 35.

[4] Ersk. iv. 2, 13; Newlands *v.* M'Kinlay, 1885, 13 R. 353.

action for payment of a prescribed account, the constitution and subsistence of the debt having been referred to the oath of the defender, he admitted the constitution, but deponed that the creditor had subsequently agreed to accept in payment certain outstanding accounts due to the defender by his customers, it was held that the qualification was intrinsic, and the oath therefore negative.[1] Where, in answer to a demand for payment of a debt, the defender pleaded the triennial prescription and the resting-owing was referred to his oath, the following rules were, on a consideration of the decisions, laid down as applicable: (1) If the oath bear that some other mode of satisfaction or extinction than payment in money was stipulated or bargained for at the contraction of the debt, that other mode, if the debtor swears it was acted on, will be a competent and intrinsic quality of the oath, although not made the subject of subsequent agreement. (2) If the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath, although not stipulated for when the debt was contracted. (3) An express subsequent agreement to forgive the debt, in whole or in part, deponed to by the debtor, will in like manner be intrinsic, and receive effect accordingly, because, so far as thus deponed to, the debt cannot be said to be resting-owing. (4) Compensation, if not sworn to have been sanctioned by the creditor, will be extrinsic, because compensation usually involves matter of law, and although the deponent may establish any relevant matter of fact by his own oath, he cannot thereby establish matter of law.[2]

A reference to the oath of a party is not admissible to supply the want of public instruments required as solemnities, such as instruments of sasine, of requisition, and the like. In like manner, where matters are entire, the want of writing in transactions concerning the titles to heritable subjects, including leases exceeding one year's duration, cannot be supplied by the oath of the party. Writing is also indispensable, and cannot be supplied by the oath of a party in the nomination of an executor; but verbal legacies to any amount are good, if admitted by the party liable to pay them. Such legacies, though not proveable by witnesses, may be proved by a

[1] Cowbrough *v.* Robertson, 1879, 6 R. 1301.

[2] Cowbrough *v.* Robertson, *sup.*, p. 1312, *per* Ld. Deas.

reference to the oath of the party liable for their payment, if they exceed £100 Scots.[1] Manifest errors or inaccuracies in a deed may be overruled or controlled by the oath of party.[2] But it seems more than doubtful whether a cause or obligation can on such evidence be *added* to a finished written agreement.[3] In almost all cases, however, to which writing is essential to bind the parties, they will be bound without it, if there have been proof of *rei interventus* or performance, total or partial, by either party on the faith of the contract; and after such *rei interventus*, the contract, if denied, may be proved by the oath of party, and in some cases even by witnesses. Thus, *rei interventus* has been held sufficient to supply the want of writing both in leases exceeding a year and in sales of heritage, in the constitution of servitudes, in submissions concerning heritage, in agreements where writing was *pars contractus*, and the like: not however in sales of ships, even though the price had been paid and possession given, writing being in that case a statutory requisite.[4]

If on considering the oath it be found that extrinsic qualities have been adjected which the deponent requires to prove, he may be heard in regard to them, and perhaps be allowed to lodge a condescendence of what he offers to prove in support of them, though they may not have been stated on the record already made up and closed. Thus, where on a reference to oath the defender deponed that the pursuer had accepted an assignation of the debt, and this having been held to be an extrinsic quality, the defender was found entitled to be heard on the import and effect of the assignment, and the mode in which he proposed to establish it.[5]

[1] Ersk. iii. 9, 7; Bell's Dict. pp. 416, 417.

[2] Sinclair *v.* M'Beath, 1869, 7 M. 934.

[3] Tait on Evid., p. 225.

[4] Stair, iv. 44, 5; Ersk. iv. 2, 9; Tait on Evid., 227; Bell's Dict., 417.

[5] Stevenson *v.* Stevenson, 1838, 16 S. 1088.

# CHAPTER XXII

## PROCEDURE DESIGNED TO OBVIATE DELAY

### I. Decree by Default


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It is of the essence of all judicial procedure that a question in controversy between parties should be brought to a determination by decision or decree within the shortest possible time, consistent with a due preservation of the equitable rights of the litigants. If for any reason a party were so desirous it would be possible, but for certain remedial or preventive procedure, for him to so retard or impede the progress of the cause as to be tantamount to a denial or frustration of justice to his opponent. Thus a party unwilling to proceed might, but for the procedure to be considered, by delaying indefinitely to implement an order of Court to lodge pleadings or documents timeously, to make payment of Court dues or money ordered to be consigned, or by borrowing and retaining the process in his hands, prevent his opponent from obtaining that speedy administration of justice with reference to the question in controversy to which he is legitimately entitled.

### I. Decree by Default

**When competent.**—The Sheriff may, in a defended action (including a jury cause), grant decree as craved or of absolvitor, or may dismiss the action in each case with expenses;—

(*a*) When any production or pleading has not been lodged; or

(*b*) Any order has not been implemented, within the time required by statute or ordered by the Sheriff;

(*c*) Where either party fails to appear by himself or his agent at any diet; or

(*d*) Where either party fails to make payment of any Court dues or deposit.

If all parties fail to appear, the Sheriff must, unless a sufficient reason to the contrary appear, dismiss the action.[1]

Prior to the Act of 1907, decree by default might competently be pronounced only in two sets of circumstances, either for failure to lodge a paper or for failure to attend a diet. The Act of 1907 has superadded to these grounds, failure to implement an order of Court and failure to make payment of Court dues or money ordered to be consigned or deposited.

(*a*) *Failure to lodge Productions or Pleadings.*—Under previous practice the consequences attendant on failure to lodge papers was regulated by the Act of 1853, which directed the Sheriff, where any condescendence or defences, or revised condescendence or defences, or other paper was not given in within the periods prescribed or allowed, to dismiss the action or decern by default, unless it was made to appear that the failure arose from unavoidable or reasonable causes, in which case it was within his discretion to allow the paper to be received on payment of expenses.[2] After the passing of the Act of 1876, the application of these provisions was attended with some difficulty, because, in the first place, the condescendence, under the provisions of that Act, was attached to the petition, so that decree by default in respect of the failure of the pursuer to lodge a condescendence was no longer possible; secondly, the defences under the Act of 1853 were lodged at a later stage of the process than under the Act of 1876; and thirdly, because some doubt existed whether the direction to the Sheriff Clerk, contained in section 18 of the latter Act, regulating procedure in case of failure to lodge

[1] Act, Rule 56. [2] Act, 1853, s. 6.

revised papers, did not supersede decree by default in their case. The only words of clear utility, therefore, subsequent to the passing of the Act of 1876, were those which dealt with "other papers," which was interpreted to mean other pleadings. Thus failure to lodge a minute dealing with the whole cause was treated as a default.[1] But under the provisions of these statutes a production did not fall under the definition of other papers, since it was in no sense a pleading. Consequently the remedy for failure to lodge a production, or a minute concerning not the whole cause but only a particular part of it, was to hold the defaulter as confessed in regard to it.[2] The Act of 1907 remedies this state of matters by providing that failure to lodge either a production strictly so called or a pleading within the time statutorily prescribed or ordered by the Sheriff, may be attended with the penalty of decree by default. As the condescendence is not now attached to the initial writ, failure to lodge it timeously may, as under the provisions of the Act of 1853, now be visited with the penalty of decree by default. It was a peculiarity of the statute of 1853 that the remedy it provided against a defaulting pursuer was the dismissal of the action, though obviously the more natural and efficacious remedy, and that which would have corresponded with the penalty imposed upon a defaulting defender, would have been a decree of absolvitor. The Act of 1907 also remedies this oversight, by making it competent for the Sheriff either to dismiss the action or to grant decree of absolvitor against a pursuer who fails to timeously lodge a production or pleading. The Act of 1853, however, contained the further provision that the periods appointed for lodging any paper might always be once prorogated by the Sheriff, without the consent of parties, on special cause shown, and might always be prorogated as often as might be necessary by the written consent of parties, with the approbation of the Court, every interlocutor, prorogating on special cause shown the time for lodging any paper, setting forth the nature of such cause, and fixing the time within which the paper should be lodged. The Act of 1876, by section 19, provided that prorogations by consent of parties of the time for complying with any statutory enactment or order of the Sheriff, with reference to the making up and closing of the record, appointing a diet of proof or of debate or otherwise,

[1] Rait *v.* Stewart, 1846, 8 D. 1224.

[2] Cal. Ry. Co. *v.* Orr, 1855, 17 D. 812; Strachan *v.* Stuart, 1870, 9 M. 116; A. S. 1839, s. 66.

were incompetent. The provisions of the Act of 1853 remained otherwise unaltered and continued to regulate practice. Probably, therefore, the phraseology of the two parts of the section of the Act of 1853, read together and considered with relation to the restrictions imposed by section 19 of the Act of 1876, meant that where a condescendence, defences, or other paper was not timeously lodged, the Sheriff possessed the power of allowing such paper to be subsequently received on payment of such expenses as he deemed just; but that where a party foresaw that, prior to the appointed day, he would be unable to lodge his paper within the period prescribed by statute, the Sheriff might once and once only prorogate the time for receiving such paper without the consent of the opposing party. The Sheriff therefore possessed the power of condoning a failure to lodge a paper timeously, and of allowing a paper which for any reason had not been timeously lodged, to be received after the lapse of the statutory period. And he possessed the further power of prorogating the period for lodging such paper. But equally obviously, the power of prorogation was permissible only where, in anticipation of his failure to comply with the statutory requisites, a party was able to show cause why an extension of the statutory time should be granted. After the actual lapse of such statutory period the power to prorogate the time had necessarily expired, though in the result, as the Sheriff possessed the power to allow the paper to be received on conditions as to expenses, a party was able to attain his object, though by a somewhat different method of procedure.

The Statute of 1907 contains, however, provisions which appear to seriously alter and modify those contained in the Act of 1853. In the first place, the Act omits all reference to the discretionary powers which the Sheriff formerly possessed with regard to the reception of papers not timeously lodged. But Rule 56 further provides that "the Sheriff may, upon cause shown, 'prorogate' the time for lodging any production or pleading or implementing any order." Some difficulty has been experienced in the construction of the word "prorogate," the question being whether its use is limited to the extension of a period still current at the date when the prorogation is granted, or whether it includes an allowance of further time for lodging a production or pleading after the statutory time has expired. If the former view be accepted as sound, then it would appear necessarily to follow that the Legislature has de-

liberately, or at least inferentially, withdrawn from the Sheriff a power which not only he formerly possessed, but which by reason of its signal utility had proved itself to be practically indispensable. Whether the rule has or has not affected this alteration depends upon the construction of the word "prorogate."[1] It may not be wholly irrelevant to recall the fact that the Act is one by which the powers and jurisdiction of the Sheriff are expressly enlarged, and not in any way curtailed, and that it[2] expressly provides that "nothing in its terms shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the Sheriff." That provision is at least relevant, as showing that, except where in clear and unmistakeable terms, or by fair and necessary inference, a power which was formerly exercised is withdrawn or curtailed, it is not in accordance with the spirit of the Act to assume a construction which would defeat the intention of the Legislature. It may perhaps be frankly conceded that to use the word "prorogate" as applying to an extension of a time which has expired, is, in the strictest sense of the word, inaccurate. But in the construction of the word occurring in an Act which deals with procedure in the Sheriff Court, the test to be applied is not what the word connotes in popular language, but what meaning is to be applied to it as a technical term in Scots legal phraseology. And for the use of the word in its less restricted sense there would appear to be ample sanction, both legislative and judicial. Thus section 12 of the Judicature Act of 1825, and section 108 of the Act of Sederunt of 11th July 1828, each contain provisions in which the word is obviously used as referring to an extension of a time which had expired. And in more than one decision that meaning has been judicially attached to it.[3] Approaching the construction of the rule, therefore, in the light of this technical meaning, and construing it without reference to prior legislation on the matter with which it deals, the rule does not appear to present any insuperable difficulty. It provides that on the occurrence of any of the cases of default which it enumerates, the Sheriff *may* grant decree

[1] *See* Davies *v.* Blake, 1908, 16 S.L.T. 263, *per* Sheriff Maconochie, K.C.; Lawrence *v.* Gray, 1908, 16 S.L.T. 466, *per* Sheriff M'Lennan, K.C.; and Cuthbertson & Co. *v.* Todd, 1908, 16 S.L.T. 597, *per* Sheriff Gardner Millar, K.C.

[2] Section 5.

[3] *See* Mitchell *v.* Mitchell, 1856, 28 Jur. 160, *per* Ld. Pres. M'Neill; Weild *v.* Weild, 1827, 6 S. 247; Nicol *v.* Johnstone, 1888, 26 S.L.R. 61, *per* Ld. Pres. Inglis.

as craved or of absolvitor, or *may* dismiss the action with expenses. But it also provides that the Sheriff *may*, upon cause shown, prorogate the time for lodging a production or pleading or implementing an order. *Prima facie*, therefore, the power of prorogation is stated as an alternative to the power of granting decree by default, and such a power is possible only on the assumption that prorogation is competent after the occurrence of the default. No doubt the power of prorogation conferred by the rule is not qualified by express authority to impose a condition of payment of expenses where prorogation is granted. But that objection is met by the answer that the question of expenses at every stage of the cause is within the discretion of the Sheriff, unless the contrary is expressly provided. In the absence of authority it cannot of course be assumed that the view expressed is sound.

(*b*) *Failure to implement Order of Court.*—Prior to the Act of 1853, and under the provisions of the Act of Sederunt of 1839, it was formerly the practice, when a party failed to lodge a pleading or to obey any other order of Court, to enrol the cause and obtain protestation or circumduction against the party in default, in respect of which, if that party was the defender, he was decerned against, or, if pursuer, the defender was assoilzied. If the party failed to obtemper any order of Court the Sheriff was, it was thought, though the Act of Sederunt did not at least in terms contemplate any failure other than that of lodging papers, authorised to close the record and either give judgment, allow a proof, or otherwise dispose of the case as he might think fit.[1] Indeed, it was considered that he might in the same circumstances give judgment in default without closing the record, since there appeared no reason why the same mode of procedure should not be followed as is the practice in the Court of Session, where, if an interlocutory order is not obtempered within the time specified, the Lord Ordinary uniformly decerns or assoilzies, as the case may be, and finds the party in default liable in expenses without previously closing the record.[1] In any event, the matter is now regulated by the provisions of the Act of 1907, which provides, as in the case of the failure to lodge pleadings or productions timeously, that a failure of either of the parties to obtemper an order of Court may, in the Sheriff's discretion, be visited by the penalty of decree as craved, or of absolvitor or dismissal of the action. If,

[1] *See* M'Glashan, p. 319.

however, the view already expressed with reference to the Sheriff's powers in regard to the reception of pleadings or productions be regarded as sound, it would appear that while he possesses a discretionary power either to grant decree against the defaulting party who fails to obtemper an order of Court or to dismiss the action, he is not precluded from permitting a prorogation of the time within which such order may be implemented, even though the time for doing so has elapsed. In other words, where the Sheriff is satisfied from explanations offered to him that the failure by a party to obtemper an order of Court has been the result of innocent mistake or excusable carelessness, he possesses the power to condone the offence, and to permit the party to remedy his fault. The possession of such a power would appear to be indispensable, since it cannot in any case be expedient that a cause should be decided without due consideration of its merits. It can hardly, therefore, have been the intention of the Legislature to deprive the Sheriff of so necessary a power.

(*c*) *Failure to attend Diet.*—At common law the Sheriff has power to pronounce decree by default where a party, after having appeared and lodged his petition or defences, as the case may be, fails to continue his appearance, by himself or his agent, at the necessary stages of the cause.[1] This common law power was, under the provisions of the Act of 1876, converted into an imperative duty, in so far that the Act prohibited the Sheriff from granting delay, unless a sufficient reason appeared to the contrary, where either one or both of the parties failed to appear at any diet. Where one of the parties failed to appear, the Sheriff was directed to pronounce decree as craved or of absolvitor, as the case might require, and where both parties failed to appear to dismiss the action. The cases of absence with which the Act of 1876 dealt were those of absence from a diet of proof, a diet of debate or "other diet" in the cause. While the two former cases occasioned no difficulty, some dubiety was experienced as to the precise meaning of the phrase "other diet in the cause." Absence upon any occasion on which one of the parties might choose to enrol the cause was thought not to fall within the definition of the clause; and it was considered doubtful, though at one time the practice was common, whether a mere enrolment could be made effectual to create a "diet" by an order appointing the

[1] *See* Ersk. IV. 1, 69, and Ivory's note; Bain *v.* Lawson, 1899, 1 F. 576, *per* Ld. J.-C. Kingsburgh.

party to appear then under certification.[1] It was thought that the word "diet" meant some occasion on which the presence of a party was required by statute or Act of Sederunt, though it was not easy to specify when such an occasion arose. The occasion when, under this provision, a decree by default was asked was when a party absented himself from the diet for adjusting and closing the record; but this was considered a proceeding of somewhat doubtful competency, since there appeared to be no imperative necessity why a party who did not desire to make any change in his statements, and had no suggestion to offer as to further procedure, should then appear. The case of a party failing to appear as a haver was not a case under the alternative in question, since such an absence was one from a diet of proof.[2] Little was to be found in the authorities to show what the statute meant, and decree by default for absence was seldom taken advantage of except for the named alternatives of absence from proof or debate. In order that decree of dismissal should be pronounced in respect of the non-appearance of the parties, it was, however, imperative that there should have been an interlocutor fixing the diet.[3] Under the Act of 1876 it was imperative that decree by default should be pronounced by the Sheriff even when no motion was made to that effect. If, however, a party, instead of taking decree by default, preferred to go on with the cause, as, for instance, for the purpose of having the evidence preserved, it was thought that, notwithstanding the words of the statute, he might still do so, and in such a case the interlocutor, in the event of the party proving successful, proceeded upon a consideration of the record or the proof, as the case might be.[4]

But as in the other clauses of the rule just considered, if the views expressed be accepted as sound, the Sheriff possesses in this case, as in the others, the power to condone the offence by allowing the defaulting party to appear at a diet subsequent to that at which the default occurred. If that be a correct reading of the statutory provisions, the Sheriff is not bound, on the occurrence of a failure of a party to attend a diet in the cause, to grant decree by default. It can hardly be doubted that any other construction of the statutory provisions would be attended by undoubted hardship. It would,

[1] Trail *v.* Andrew, 1877, 14 S.L.R. 234; Dove Wilson, p. 280.

[2] Vickers *v.* Nibloe, 1877, 4 R. 729.

[3] Macdonald & Co. *v.* Dewar, 1903, 6 F. 189.

[4] Douglas *v.* Gibb, 1855, 17 D. 434.

for instance, be a matter for much regret if, where a pursuer attends a diet of proof accompanied by his witnesses, he should, merely because his opponent fails to attend, be compelled to accept a decree as craved, instead of being allowed, if he so chooses, to lead his proof and obtain decree in respect of the evidence so adduced. In the former case it is within the power of the defender to be reponed as against a decree by default, with the result that at a second diet of proof the pursuer is compelled, through no fault of his own, to undergo all the trouble and worry necessary to have his witnesses present and to lead his proof. And again, where for instance it is within the Sheriff's personal knowledge that a party has some distance to travel by train to the seat of the Court, and that there are reasons for assuming that the party's absence is due to the unpunctuality of his train, it would appear to be an undoubted hardship if the statutory provisions were so construed as to compel the Sheriff to grant decree by default. In such a case it would appear to be practically indispensable that the Sheriff should possess the power of adjourning the diet for a reasonable time to enable it to be ascertained whether the defaulting party's absence were due really to intention to abstain from appearing, or from some unavoidable cause for which he is able to offer a satisfactory excuse or explanation. It can hardly, it would seem, have been the intention of the Legislature that the procedure to be adopted on the occurrence of the failure of a party to attend a diet should be entirely independent of any wish on the part of, or motion by, his opponent, who should in such a case possess no option but to accept decree in his favour of absolvitor or of dismissal, as the case might be, as the Sheriff in his discretion may choose to direct. Where both parties fail to appear, the statutory direction is that the Sheriff shall dismiss the action unless a satisfactory reason to the contrary appear. This part of the rule would seem at any rate to contemplate that the Sheriff may adjourn the diet for a reasonable time, because if both parties fail to appear it is manifestly impossible that at the diet where the failure to attend takes place, a satisfactory reason for their absence can be furnished to the Sheriff. He may therefore apparently adjourn the diet for such time as may enable him to ascertain if the parties, or either of them, have a sufficient excuse to offer for their failure to attend. If no such excuse or explanation be forthcoming, then he must dismiss the action. If both parties fail to attend the

diet, but one of them subsequently advances to the Sheriff a reason or explanation which appears to him to be sufficient, while the other does not, then decree as craved, or of absolvitor, as the case may be, may be granted against the defaulting party.

(*d*) *Failure to pay Dues or Deposit.*—This is an entirely novel provision, and under it decree by default may now be pronounced in respect of the failure of either party to pay Court dues or money ordered to be paid by the Sheriff, such as the fees of shorthand writers (under Rule 67), or to make the jury trial deposit under Section 33 of the Act. The Sheriff-Clerk is reponsible for the collection of all fees specified in the tables of fees, and it is his duty to refuse to receive any paper chargeable with a fee, or to transmit any service or petition for completion of title for extract, or to allow any marking of an appeal, or other marking to be made in respect of which a fee is payable, unless the appropriate fee has been paid. It is further his duty, when a fee is declared payable prior to any particular step being taken in a process, and such fee has not been paid by either party, to call the attention of the Sheriff to the matter. The Sheriff, unless the fee is thereupon paid, must thereafter proceed with the case as if the party by whom the unpaid fee is payable were absent or in default.[1]

**Nature of Decree by Default.**—Decree by default is a decree apart from any consideration of the merits, and, unlike a decree in absence, which can be pronounced only against a defender, may be pronounced against any of the parties to the cause. It is a decree *in foro*, and although pronounced in the absence of a party, is not, under any circumstances, a decree in absence.[2] Like any other decree *in foro*, it becomes final unless appealed against at the proper stage. Being an interlocutor disposing of the merits of the cause, it is appealable at once and in the usual way.[3] Until recalled, a decree by default constitutes *res judicata* and excludes any other action on the same grounds.[4] After it has become final by the lapse of the appeal days it can only be challenged by reduction, and, being a decree *in foro*, suspension is incompetent.[5] It is in the discretion of the Court whether it will be reduced or not, and delay

[1] A. S. 7th March 1908, s. 2.

[2] Forrest *v.* Dunlop, 1875, 3 R. 15; Boak *v.* Watson, 1860, 22 D. 1468.

[3] Young *v.* Mackenzie, 1859, 21 D. 1358.

[4] Forrest *v.* Dunlop, *sup.*

[5] Maule *v.* Tainsh, 1878, 6 R. 44.

in bringing the reduction, though not an absolute bar, will render a reduction difficult.[1]

**Reponing against Decree by Default.**—The party against whom a decree by default has been pronounced may be reponed against the decree by appeal either to the Sheriff or to the Court of Session. The decree will not, however, be recalled as a matter of right upon the defaulting party making good his default,[2] and it is entirely within the discretion of the appellate Court to grant or refuse the recall, and upon such conditions as to expenses as may seem most just. If the Sheriff on appeal have refused to repone, the Court of Session will not readily interfere with his discretion.[3] If the decree has not been pronounced till after repeated defaults, the reponing may be altogether refused. It will, in any event, be allowed usually only on payment by the defaulting party of all the expenses occasioned by his default, though, where the default appears to have been occasioned as much by one party as by the other, payment of the expenses may be dispensed with.[4] On the other hand, where a mere payment of the actual expense occasioned will not reimburse the other party, a sum in addition to the expenses may be ordered to be paid by the defaulting party by way of penalty.[5] Neither under former statutes nor under that of 1907 is there any formal condition attached that where the default has been occasioned by failure to lodge a paper, such paper must be tendered along with the appeal. In the absence of the necessary paper the recall of the decree will not, however, be readily granted. There is no absolute incompetency in reponing a party for a second time, even for the same default, though the extenuating circumstances would require to be very special to lead to the adoption of such a procedure.[5]

Where in a case a decree of default has been pronounced by the Sheriff-Substitute, the decree is by its nature appealable either to the Sheriff or to the Court of Session, provided, of course, in the latter case that, by reason of the value of the cause, review of the Sheriff's decision is not expressly excluded by statute. But while it cannot be laid down that of necessity a defaulting party desirous of being

[1] Forrest *v.* Dunlop, *sup.*

[2] Arthur *v.* Bell, 1866, 4 M. 841; Anderson *v.* Garson, 1875, 3 R. 254.

[3] M'Gibbon *v.* Thomson, 1877, 4 R. 1085; Nicol *v.* Johnston, 1888, 26 S.L.R. 61.

[4] Rutherford *v.* Beveridge, 1826, 4 S. 755.

[5] Hamilton *v.* Christie, 1857, 19 D. 712; Mather *v.* Smith, 1858, 21 D. 24; Pearson *v.* M'Gaven, 1866, 4 M. 754.

reponed against a decree by default must appeal to the Sheriff in the first instance before bringing the judgment to the review of the Court of Session, it may confidently be deduced from a consideration of the decisions that such a course is not only the usual but the only proper one, even where from the value of the cause review of the Supreme Court is not excluded. If, after having appealed to the Sheriff, the appellant does not appear in support of his appeal, in general the matter will be held to be concluded against him.

The cases in which, prior to the Act of 1907, decree by default was granted, and against which the defaulting party sought to be reponed, were practically confined to those in which such party had failed to attend a diet in the cause. But the reasons which induced the Court to repone or refuse to repone the defaulting party apply with equal force to the provisions of the Act of 1907. And (if the views as to the construction of the rule in the Act of 1907 already expressed be sound) no alteration of the rule has been effected by the Act, so that just as under former practice the Sheriff or the Sheriff-Substitute (as the case might be) was not compelled to grant decree by default except where no reasonable excuse for such a course was forthcoming, neither is he under the provisions of the Act of 1907 precluded from considering whether the default has been occasioned by conduct for which the defaulting party has a reasonable or sufficient excuse, nor must he perforce grant decree by default on the mere occasion of the default itself. A brief consideration of the decisions under former procedure will best illustrate the reasons which have hitherto guided, and which in the future may be expected to guide, the Court in the exercise of their discretion in reponing or refusing to repone a defaulting party. In the following cases the appeal was refused: Where the cause was appointed to be heard before the Sheriff on appeal, and no appearance being made for the defenders, the Sheriff heard the pursuer's agent and thereafter granted decree as concluded for. The defenders appealed to the Court of Session and asked to be reponed, explaining that the absence of their agent was due to the fact that at the time he was engaged in another Court. The Court refused the appeal, it being pointed out that nothing but very exceptional circumstances, such as a very clear and strong reason for the party's absence, would induce the Court to open up a decree pronounced in such circumstances, and that as the excuse offered in this instance was one which could not

have been listened to by the Sheriff, it was not one which would induce the Court to repone the defenders.[1] In another case, a defender was assoilzied in respect of no appearance by or on behalf of the pursuer at a diet of proof. The pursuer appealed to the Sheriff, and represented that his failure to appear was caused by the illness of his agent and a mistake on the part of his clerk. The Sheriff refused to repone the pursuer, and the Court on appeal adhered to the Sheriff's decision, on the ground that where it appears that the default was in consequence of such neglect as left no sufficient reason or ground of excuse to account for the party's absence, no ground for the recall of the decree is made out.[2] In a case which occurred after the passing of the Act of Sederunt of 21st November 1895, the provisions of Section II. of which are identical with those of the corresponding section of the Act of Sederunt of 7th March 1908, the Sheriff-Substitute, on the ground that the pursuer had failed to attend a diet of cause appointed by him for adjusting the record, and also in respect that he had failed to pay the dues payable by him at the closing of the record under the table of fees, pronounced an interlocutor dismissing the action. The pursuer appealed to the Sheriff, and his agent explained that, being much occupied at the time the matter had escaped his attention, but the Sheriff, thinking the explanation wholly inadequate, dismissed the appeal, a decision to which the Court on appeal adhered, holding it to be a matter within the discretion of the Sheriff-Substitute, subject to an appeal to the Sheriff, with the exercise of which the Court would be very slow to interfere. It was pointed out in that case that the Sheriff has power, independently of the statute and at common law, to consider, if a party does not appear at a time appointed by him for any step in the process to be taken, whether it is not just and reasonable in the circumstances that the action should be dismissed.[3] In another case a Sheriff appointed parties to be heard in an appeal on the 20th of May. The diet was duly published in the Act Book of the district Court, which was the only official intimation. The agent for the defenders failed to consult the Act Book, relying upon certain unofficial printed rolls of cases in use to be consulted by practitioners

[1] Stevenson *v.* Hutcheson and Anderson, 1885, 12 R. 923.

[2] M'Gibbon *v.* Thomson, 1877, 4 R. 1085.

[3] Bain *v.* Lawson, 1899, 1 F. 576.

in which the diet was not noted. He failed in consequence to attend the diet, and the Sheriff, delaying his judgment till the 1st of June following, dismissed the appeal. The Court refused to repone the defender, holding that the Sheriff had acted with no undue haste, and that there were no circumstances disclosed sufficiently extenuating to induce the Court to interfere with the exercise of the Sheriff's discretion.[1] It will, however, be noted that the Sheriff delayed pronouncing his interlocutor dismissing the action till the lapse of ten days from the date of the actual default, and it may perhaps be presumed that if during the interval a sufficient excuse for the default had been forthcoming a different result might have followed. Under the provisions of the Act of 1907, however, it would appear that the course which the Sheriff adopted in this case of delaying the issue of the interlocutor is now permissible to the Sheriff-Substitute.

In the following cases the Court has reponed the defaulting party: Where a pursuer sought to be reponed against a decree pronounced in respect of his failure to attend a diet of proof, the Court allowed the appeal on payment of the full expenses occasioned to defender by the pursuer's default, it being a material consideration in the judgment of the Court that the fault could not wholly or even perhaps mainly be attributed to the pursuer, but was due to the agent himself, with whose conduct of the case the pursuer had no means or opportunity of becoming acquainted.[2] In an action of count and reckoning, failing which for payment of £90, the defender after protracted delays twice failed to appear at diets for his examination as a haver, whereupon decree for the sum claimed with expenses was pronounced by the Sheriff-Substitute. The Sheriff on appeal refused to repone him, but the Court on appeal reponed him on condition of his paying all expenses incurred by the pursuer subsequent to the first prorogation of the time for lodging his defences. But the Court expressly recalled the judgment of the Sheriffs, not because they were wrong or that they were reviewed upon their merits, but solely in the exercise of the discretion vested in it.[3] In a case in which pursuer's agent had twice failed to appear at a diet of debate, his absence being due to a misunderstanding, the Court allowed

[1] Comrs. of Motherwell *v.* C. C. of Lanark, 1901, 4 F. 151.

[2] Morrison *v.* Smith, 1876, 4 R. 9.

[3] Vickers & Son *v.* Nibloe, 1877, 4 R. 729; *see also* Robb *v.* Elgin, 1877, 14 S.L.R. 473.

him to be reponed on payment of the whole expenses of defender both in the Sheriff and the Supreme Court.[1] In another case parties were engaged in a *bona fide* though unsuccessful attempt to negotiate a settlement, and defender in consequence failed to lodge defences within the statutory period. Decree of default was pronounced by the Sheriff-Substitute, and an appeal against the decree was dismissed by the Sheriff. The Court, however, remitted to the Sheriff to repone the defender on payment of £3, 3s. of expenses, but observed that the defender's proper course would have been to have applied for a prorogation of the time for lodging his defences.[2] In an action by trustees against the law agent of the trust, concluding for an accounting, and failing this for payment of a sum of £500, the defender lodged no defences, but put in a minute craving the Court to sist proceedings in order to give him time to lodge his accounts, which he alleged would show a debit balance against the trust. The Sheriff-Substitute granted a sist for ten days, and at the end of that time, the defender having failed to lodge his defences or produce his accounts, granted decree for the sum sued for, a judgment which the Sheriff on appeal upheld, no appearance at the appeal being made by or on behalf of the defender. The defender appealed to the Court of Session and craved to be reponed, and the Court recalled the interlocutor of the Sheriff-Substitute and remitted to the Sheriff to consider defender's application, being moved to this course chiefly if not entirely by the consideration that the sum for which decree had been granted was a random sum fixed at pleasure by the pursuer, and that the case therefore was one requiring exceptional treatment. It was observed that in general a party against whom a decree by default has been pronounced by the Sheriff-Substitute has ample opportunity of being reponed against it by appeal to the Sheriff; but if on the appeal he fails to appear in support of his application, the matter will in general be held to be concluded against him. The Court ought not to be asked to interfere at so late a period by giving the party a further opportunity for showing that he may be restored against the consequences of his own default, when a sufficient opportunity has already been afforded him which has been neglected without any reasonable excuse.[3]

[1] M'Carthy *v.* Emery, 1897, 24 R. 610.

[2] Bainbridge *v.* Bainbridge, 1879, 6 R. 541.

[3] Browne's Trs. *v.* Milne, 1897, 24 R. 1139, *per* L. Kinnear; *see also* King *v.* Gavan, 1880, 17 S.L.R. 583.

## II. Wakening of Process

**Action falling Asleep.**—If no interlocutor has been pronounced in a cause for a year and a day, it is held to have "fallen asleep,"[1] by which figure of speech is meant that after such a delay no step can competently be taken in the process until it has been "wakened." As has already been seen, if, in an action which has been served and no appearance entered, no enrolment is made for a period of a year and a day after the date when appearance was due, the instance falls and the pursuer must bring a new action. In such circumstances the action has not fallen asleep, and cannot therefore be wakened.[2] Under the provisions of section 15 of the Act of 1853, an action in which no step had been taken for six months stood dismissed. But the Act of 1876 repealed that provision, with the result that once an action fell asleep no step whatever could be competently taken until it was awakened. The provisions of the Act of 1907, with some minor exceptions, are practically identical with those contained in the Act of 1876. The period of a year and a day counts from the date of the last interlocutor in the cause. No step of procedure is therefore sufficient to waken a cause unless it be followed by an interlocutor; a mere formal interlocutor pronounced for the purpose of keeping the action awake is, however, sufficient. The year and day do not expire till the expiration of the day following the anniversary of the last interlocutor. Thus a cause tabled on the 1st of May does not fall asleep until the 3rd of May in the following year. But it is immaterial that the statutory period elapses during vacation or upon a public holiday. An action cannot fall asleep except through the carelessness or neglect of one or other of the parties or their agents, and as the proceedings for wakening, except when taken by the mutual consent of parties, are in some respects unsatisfactory, care should be taken never to allow an action to stand in need of such procedure. Where an action has been sisted and more than the statutory period has elapsed since the last interlocutor, it would appear to be incompetent to move for a recall of the sist without first wakening the cause in accordance with the statutory procedure.[3]

[1] Act, Rule 101; Act 1876, s. 49.

[2] M'Kidd *v.* Manson, 1882, 9 R. 790.

[3] *See* American Mortgage Co. of Scotland *v.* Sidway, 1906, S.C. 500.

**Wakening of Cause.**—(*a*) *Of Consent.*—Where the whole of the parties or their agents subscribe a minute on the interlocutor sheet consenting to the cause being wakened, the Sheriff may pronounce an interlocutor wakening the cause, and thereafter proceed with it.[1] The wakening is competent apparently any time within the years of the long prescription.

(*b*) *Not of Consent.*—Where all parties do not consent, the party desiring to have the cause wakened may lodge a minute to that effect, which the Sheriff may order to be intimated to the other parties or their agents, and to be published in such manner as he shall direct. The agent for the party applying for wakening must then lodge a certificate that the intimation and publication ordered have been duly made. If satisfied, the Sheriff may thereafter pronounce an interlocutor wakening the cause and proceed with it.[2] While the intimation may statutorily be made to the parties or their agents, considerations of expediency suggest that it should be made in general to the parties themselves, so as to avoid any question as to the subsistence of the agent's authority. The Act of 1876 contained peremptory directions as to publication of the notice, but under the Act of 1907 the whole matter of intimation and publication is left entirely to the Sheriff's discretion. Publication may in some cases be deemed unnecessary, and in general intimation by registered letter will probably be deemed sufficient. Where the party to whom intimation is to be made has no known agent, the notification must obviously be made to him; where the party is abroad, edictal citation will in general be ordered. The power of wakening in absence, like that of consent, may apparently be exercised any time within the period of the long prescription.

### III. Process Caption

All processes which are borrowed are understood to remain in the hands of the borrowing agent, and to be returnable by him on demand. If the agent fail to return the process on demand, his failure may be treated as of the nature of a contempt of Court. Formerly in such circumstances a summary warrant, called a process caption, might be issued for his imprisonment until the process was returned. Such a warrant is still competent, but in practice it has

[1] Act, Rule 102; Act 1876, s. 49 (1). [2] Act, Rule 103.

been and no doubt will continue to be superseded by the practice either of pronouncing an order appointing the borrower to return the process within a certain time under the penalty of a fine, or of imposing the fine of £1, for which, both under the Act of 1876 and section 57 of the Act of 1907, the agent who borrows a process and fails to return it in time for a diet in the cause for which it is wanted is liable. An order imposing a fine upon the borrowing agent, who may not be the agent of either party to the cause, may on cause shown be remitted by the Sheriff who grants it, but it is not subject to review. So far as the pronouncing such an order is concerned, every agent practising before the Court is subject to the jurisdiction of the Sheriff. A process cannot, however, be borrowed except by an agent who is entitled to practise in the jurisdiction, or by his duly authorised clerk, for whom he is responsible.[1]

[1] Act, Rule 16; Law Agents Act 1873, s. 15.

# CHAPTER XXIII

## SUING *IN FORMA PAUPERIS*

### *THE POOR'S ROLL*


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**Introductory.**—Since 1424, in which year an Act dealing with the subject was passed by the Scots Parliament, it has been the policy of the Scots law to ensure that no person should be prevented from litigating, either as a pursuer or as a defender, solely by reason of his poverty, provided he could establish in the one case a *prima facie* just and legal claim or demand, or in the other a relevant defence. Provision has accordingly since that time consistently been made for the appointment of certain persons whose duty it is to act gratuitously on behalf of those who, by reason of their poverty, are unable to obtain competent professional assistance in the conduct of litigation in which either as pursuer or defender they have a *probabilis causa litigandi*. The more modern regulations having the attainment of this object in view are embodied in the Acts of Sederunt of 1839 and of 16th January 1877, and in the Act of 1907 these regulations are in substance repeated, though with some important modifications and amendments.

**Persons entitled to Benefit of Poor's Roll.**—The persons entitled to the benefit of the roll were described in the regulations embodied in the Act of Sederunt of 1839 as those who were "not possessed of funds for paying the expense" of suing or defending an action. The Act of 1907 provides that where parties are unable from poverty to sue or defend an action the Sheriff may admit them to the

benefit of the poor's roll, if upon the report of the procurators for the poor he is satisfied that such person is entitled thereto.[1] The description of the parties entitled to the benefits of the roll is in both cases somewhat wide, though from the nature of the case it would perhaps be somewhat difficult to make it more definite and precise. The question whether an individual does or does not fall within the category of those who by reason of their poverty are unable to sue or defend an action depends partly on his financial circumstances and partly on the nature and character of the action in prospect. But the roll is obviously meant for the benefit of those only who by reason of their poverty are unable to sue or defend an action, and not merely for those who by reason of their social position would be inconvenienced by having to pay the necessary expenses incurred in the litigation. In other words, the class of persons indicated by the regulation are doubtless those to whom a denial of the benefits of the roll would be tantamount to something like a denial of justice.[2] But it does not appear to be necessary that the applicant should be in dire or absolute poverty, and under the previous regulations it has been held that where there was nothing exceptional an applicant had a right to be admitted whenever he was unable to pay his way in the litigation.[3] An applicant earning a sum such as 23s. a week is not in general entitled to the benefit of the roll, though there may be special circumstances which would justify his admission.[4] Thus, where a workman in receipt of 23s. a week was sued by his wife for adherence and aliment, he was, on the report of the reporters that he had a *prima facie* valid claim for an action of divorce against his wife for adultery, admitted to the benefit of the roll, it being pointed out that his wife had practically compelled him to bring his action of divorce, since it must be assumed that her action against him was virtually an attempt to extract aliment from him to enable her to live in adultery, and that the refusal to allow him to sue *in forma pauperis* would result in his having to pay not only his own costs but those of his wife in addition to her aliment.[5] But a workman earning 31s. 6d. a week, having a wife and two children to support with £16 of rent to pay, was refused admission

[1] Act, s. 51.

[2] *See* Walker *v.* Brown, 1860, 22 D. 678; Robertson, 1880, 7 R. 1092; Whyte, 1884, 11 R. 1145; Wright *v.* Brown, 1885, 22 S.L.R. 637.

[3] Anderson *v.* Blackwood, 1885, 12 R. 1263.

[4] Robertson, 1880, 7 R. 1092.

[5] Brown *v.* Brown, 1906, 8 F. 687.

to the poor's roll.[1] Under the provisions of the section of the Act of 1907, the Sheriff appears to have a discretion to admit an applicant where, upon the report of the procurators, he is satisfied that such person is entitled thereto. The phraseology of the section would appear to imply that the Sheriff must personally be satisfied of the applicant's right to admission, and that he has a discretion to refuse the applicant admission where he is not so satisfied, even if the report be wholly favourable. As will be seen, such an interpretation of the section would appear to be directly contradictory of the provisions of a subsequent rule, which would appear to give the Sheriff no discretion to refuse an applicant admission where the reporters on *probabilis causa* are of opinion that he is justly entitled thereto.

**Admission to Roll.**—A person desirous of obtaining the benefit of the poor's roll must, in the first place, obtain a certificate signed by the Inspector or an assistant Inspector of Poor of the parish or district in which the applicant resides, certifying that the applicant is unable through poverty to pay for the conduct of legal proceedings.[2] The Act of Sederunt of 1839 provided that the certificate should be signed by the minister of the parish, or by the heritor on whose lands the pauper resided, or by two elders, bearing that it consisted with their personal knowledge that the applicant was not possessed of funds to pay the expenses of the litigation. The granting of the certificate has now been transferred to the officials who administer the poor laws, and who are the persons with whose personal knowledge the fact of the applicant's poverty is most likely to consist, or who at any rate are presumably best in a position to verify the applicant's representations as to his inability to defray the expenses of the proposed litigation. But that observation applies more particularly to those persons who are in receipt of relief, and with regard to such persons there can be no doubt that the poor-law officers are the persons most likely to be acquainted with such an applicant's financial position. But it will not fail to be noted in the first place, that the certificate need not now bear that it accords with the granter's personal knowledge that the applicant is not possessed of the requisite funds. In the second place, that the certificate need only now bear that the applicant is, through poverty, unable to pay for the conduct of legal proceedings, not that, as formerly, he is not

[1] Macaskill *v.* M'Leod, 1897, 24 R. 999.

[2] Act, Rule 162.

possessed of funds sufficient to pay the expenses of litigation. Probably the two phrases are, or were meant to be, equivalents, though the later phrase would appear to be somewhat wider in its scope than the earlier. Presumably, what is necessary now is that in the opinion of the Inspector or his assistant, the applicant is not able to pay for the conduct of legal proceedings. But no provision is made for ascertaining the basis or ground of such opinion, and not improbably different inspectors will take different views of the kind or degree of the poverty necessary. In the third place, the rule provides no means by which an Inspector of Poor or his assistant can be compelled to grant the necessary certificate. Under the former regulations, the person applied to was not at liberty to refuse the certificate because he was unable to grant one in the statutory terms required; he was in that case obliged to give one in terms setting forth what were the circumstances of the applicant to the best of his knowledge and belief.[1] Further, he had no right to take into consideration the merits of the proposed action or defence, or to consider whether the applicant ought or ought not to proceed with the proposed litigation. And if he altogether refused to grant a certificate he might be cited before the Sheriff to give evidence as to the applicant's circumstances.[2] In extreme cases he might even be subjected in the expenses which his non-fulfilment of his duties imposed by the Act of Sederunt occasioned.[3] Under the provisions of the section of the Act of 1907, it would appear that if the Inspector is of opinion that the applicant is not through poverty unable to pay for the conduct of legal proceedings, he is entitled to refuse to give a certificate of any kind. Probably, however, even in virtue of the fact that, as will be seen, the certificate is no longer (as it formerly was) conclusive evidence of the applicant's right to sue *in forma pauperis*, inspectors of poor will, in granting the certificate, state the circumstances which in their opinion lead to the conviction that the applicant is or is not financially in a position to pay for the conduct of legal proceedings. The fact that an applicant has been and is in receipt of permanent parochial relief is sufficient evidence *per se* of his poverty,[4] though, of course, to obtain the benefit of the poor's roll the person in receipt of relief must first be formally

[1] Glass, 1833, 11 S. 543; Smith, 1834, 12 S. 890; Dickson, 1852, 14 D. 330.

[2] Glass, *sup.*; Smith, *sup.*

[3] Morris *v.* Greig, 1835, 13 S. 1092.

[4] Muir, 1849, 11 D. 517.

enrolled.[1] But a person in receipt of parochial relief must either sue *in forma pauperis* or find caution for expenses.[2] The certificate appears to be a necessary prerequisite to the presentation of the petition. It does not further appear that the Sheriff possesses any power similar to that possessed by the Supreme Court, of remitting the application to any one other than an Inspector of Poor to grant the necessary certificate in such a case, for instance, as that of a private soldier stationed in India desirous of raising an action in the Scots Courts.[3]

**Petition for Admission.**—Having obtained the required certificate, the applicant then applies to the Sheriff by petition, in which the nature of the cause to be sued or defended is set forth,[4] craving to be admitted to the benefit of the poor's roll, and lodging the necessary certificate along with his petition.

Where the applicant is a pupil or under guardianship, the application must be made with consent of the tutor or curator as the case may be, if there are any; and if there be none, the Court will first of all appoint a tutor or curator *ad litem*.[5] The Sheriff does not appear, at this stage, at least, to possess any power to review the certificate or to challenge its accuracy, and on presentation of the petition, accompanied by the certificate, he must remit it to the procurators for the poor for their consideration. Under previous practice, if the certificate were special, the Sheriff had power to determine whether the circumstances were such as to entitle the applicant to admission, and he might, if he thought fit, order further inquiry at this stage. If the petition were presented without a certificate, and the reasons advanced for its absence were sufficient, such as that none of the persons specified in the Act of Sederunt were in a position to grant it, the Sheriff might take means for ascertaining the applicant's circumstances. There does not, however, appear to be conferred on the Sheriff under the Act of 1907 any power even to look at or criticise the terms of the certificate, to dispense with its absence, or to order any inquiry into the applicant's circumstances.

**Remit to Poor's Agents and Inquiry.**—The procurators for

[1] Hunter *v.* Clark, 1874, 1 R. 1154.

[2] Robertson *v.* Midlothian C. C., 1898, 25 R. 569.

[3] *See* Forrest, 1907, S.C. 435.

[4] *See* Duncan, 1846, 8 D. 411; Grant, 1884, 21 S.L.R. 549.

[5] Davidson, 1865, 4 M. 276 (Pupil); Rennie, 1851, 13 D. 1257 (Married Woman).

the poor then notify the parties of the presentation of the petition.[1] Presumably the rule means that they shall appoint intimation to be made to the opposite party, probably by registered letter. The agents for the poor then make such inquiry as they deem fit, either by hearing parties or otherwise, and make a report to the Sheriff. Under the Act of Sederunt of 1839, the only matter on which the agents were directed to report to the Sheriff was whether in their opinion the applicant had or had not a *probabilis causa litigandi*, though if the respondent denied the applicant's poverty it did not, it was thought, appear incompetent for them to inquire into and report upon that matter also. But under the provisions of the Act of 1907 the agents are required to report not only upon the *probabilis causa*, but also upon the fact of the applicant's poverty and of his right to litigate *in forma pauperis*. The certificate of poverty is therefore only *prima facie* evidence, and the agents are, it would appear, not only entitled but required to form their own opinion upon that fact as well as upon the *probabilis causa*. The respondent, therefore, would appear to be entitled, as a matter of equity if not of right, if he denies the applicant's right to be admitted to the benefit of the poor's roll on the ground of poverty, to adduce such evidence at this stage in support of his plea as he may consider proper, and to be heard in support of his contention. The party opposing the application for admission to the poor's roll is entitled to see the precognitions submitted to the reporters, subject to a discretion in them to withhold the names and addresses of the witnesses.[2] After such inquiry into the matter as they deem necessary or proper, the agents then report to the Sheriff that—(*a*) the applicant has or has not a probable cause of action, and (*b*) that he is or is not entitled to the benefit of the poor's roll.

**The Report.**—On considering the report the Sheriff then grants or refuses the applicant the benefit of the poor's roll. If the report bear that the applicant has a probable cause of action, and that he is entitled to the benefit of the poor's roll, the Sheriff does not appear, under the terms of the Act, to have any discretion in the matter, and he must thereupon appoint one of the agents to take charge of the applicant's case.[3] Further, the Sheriff does not appear to possess under the rule any power to review the decision of the

[1] Act, Rule 163.

[2] Cant *v.* Pirnie's Trs., 1906, 8 F. 1120.

[3] Act, Rule 164.

reporters, when they report either affirmatively or negatively either with regard to the *probabilis causa* or to the applicant's right to admission to the roll on the ground of poverty. But section 51 of the Act provides, as has been seen, that where parties are unable from poverty to pursue or defend an action, the Sheriff may admit such parties to the benefit of the roll if, upon the report of the agents for the poor, he is satisfied that such person is entitled thereto. The phraseology of the section of the Act would appear to be slightly in conflict with the terms of the rule, which seem to be peremptory. Reading the two clauses together, it would appear that where the reporters state affirmatively that the applicant has a probable cause, and that he is entitled to the benefit of the roll on the ground of poverty, the Sheriff has no discretion to review that decision, and must therefore admit the applicant, and appoint an agent to take charge of his case. The Sheriff has not, and did not have under previous practice, any power to review the decision of the agents as to the probable cause, the agents being the parties to whom the sole determination of that point was reserved.[1] Obviously, the Sheriff as the ultimate judge in the cause could not with propriety form an opinion in the case *ex parte*. But where the agents report that the applicant has a probable cause, but deny that he is entitled to the benefit of the poor's roll, the Sheriff is entitled to admit the applicant to the benefit of the roll if, after considering the report, he is satisfied that the applicant is justly entitled to such benefit. The agents would therefore appear to be the final judges on the question whether the applicant has a probable cause of action, but it is for the Sheriff to decide whether he is entitled to the benefit of the roll on the ground of poverty, provided the agents have reported affirmatively as to the *probabilis causa*. If there be a gross neglect of duty on the part of the reporters, or other gross miscarriage of justice, the Sheriff probably possesses the power to interfere.[2] No provision is made by the Act for the case of the reporters differing in opinion either with regard to the fact of the applicant's right to sue *in forma pauperis*, or to the fact of his possessing *prima facie* a just and legal claim to sue or defend the action. If, however, they differ in opinion with regard to the applicant's possessing a probable cause, it will presumably be in

[1] A. B. *v.* C. D., 1833, 12 S. 58; Irvine, 1842, 5 D. 372.

[2] *See* Robson, 1876, 13 S.L.R. 421; M'Intosh *v.* Roy, 1898, 25 R. 899.

the Sheriff's discretion to decide, and unless there be sufficiently strong reason to the contrary, he will in general be guided by the rule followed in the Supreme Court, which is to give the applicant the benefit of the doubt.[1] After the petitioner is admitted, the objection that the petitioner is not sufficiently poor, is not renewable during the course of the litigation, unless there be some change in his circumstances. The agent who is appointed by the Sheriff to take charge of the applicant's case must conduct it to its final issue, notwithstanding that during its progress he may have ceased to be an agent for the poor.[2]

**Effect of Admission.**—A person admitted to the poor's roll is not liable in payment of any of the dues of Court or fees to his agent, or to the Sheriff Officer who have acted for him, unless these are awarded against and recovered from the opposite party.[3] But the litigant is liable to his agent for actual outlays incurred with his sanction.[4] In the Court of Session it has been said that a change of circumstances may render the former pauper liable in expenses to his agent and the officer, and that if the agent recover money in the course of the process he may deduct his expenses from it, whether the pauper has or has not been found entitled to expenses against his opponent. Having regard to the express words of the rule, it is doubtful how far these principles are applicable to them, but they could hardly, it would seem, apply where the money recovered was specifically appropriated to some purpose, such as payment of aliment. In general, when a pauper succeeds, the opposite party should be found liable in expenses, and that this course shall be followed is expressly directed by the Act of 1424. The expenses of obtaining the applicant's admission to the roll should not, however, be included in those awarded him.[5] Though at one time the practice differed, a pauper who is unsuccessful is now invariably found liable in expenses to his successful opponent in the same way as any ordinary litigant, his opponent being allowed to recover them as

[1] *See* Drummond *v.* Fletcher, 1889, 17 R. 51; Watson *v.* Callendar Coal Co., 1888, 16 R. 111; Carr *v.* N. B. Rly. Co., 1885, 13 R. 113; Marshall *v.* N. B. Rly. Co., 1881, 8 R. 909; *but see contra* Ormond *v.* Henderson & Son, 1897, 24 R. 399; Edgar *v.* Johnston, 1904, 6 F. 825.

[2] Act, Rule 165; A. S. 1839, s. 135.

[3] Act, Rules 166, 168; A. S. 1839, s. 135.

[4] Act, Rule 166.

[5] *See* A. S. 21st Dec. 1842, s. 15 (Supreme Court), and Wells *v.* Kerr, 1886, 2 S.C.R. 84.

best he can.[1] This rule applies equally to expenses found due by interim as by final decrees. Similarly, a pauper is not reponed against a decree in absence or by default in more favourable terms than are accorded to any other party.[2] With the conclusion of the action by extracted decree the gratuitous services of the poor's agents and others seem to terminate, there being no provision under either former Acts of Sederunt or the Act of 1907 for diligence under the decree being done gratuitously.[3]

**Striking Party off Roll.**—The Sheriff may at any time, presumably on cause shown, deprive any litigant of the benefit of the poor's roll.[4] The use of the words "deprive" and "litigant" would appear conclusively to show that the power of the Sheriff is confined to those cases where a change of circumstances occurs disentitling a litigant already admitted to the benefit of the roll, and not to any discretion on the Sheriff's part to refuse the application when the report of the agents for the poor is favourable to his admission, both on the ground of probable cause and of poverty.[5] The power to deprive a litigant of the benefit of the roll may be exercised when circumstances occur to end either the probable cause or the litigant's poverty. Thus, where a tender, *prima facie* sufficient, is made in an action of damages, a litigant who refuses it without adequate reasons may be struck off the roll.[6] In like manner, a pauper receiving an accession of wealth which removes him from the class for which the poor's roll is intended, will be struck off. The power conferred by the rule is, however, wide enough to meet the case of any emergency, and would appear to be applicable to such a case as that of a pauper who abuses his privilege by carrying on the litigation in an unnecessarily vexatious manner.[7]

**The Agents for the Poor.**—*Their Appointment.*—The Sheriff[8] annually makes an order appointing the agents enrolled in his Court (or where the Sheriffdom is divided into districts having separate local Courts, the agents enrolled in the district Courts)

[1] *See* Mackay's Prac., ii. 605; Gordon *v.* Davidson, 1865, 3 M. 938.

[2] Ord *v.* Ord, 1861, 24 D. 25.

[3] Dove Wilson, pp. 206–7.

[4] Act, Rule 169.

[5] A different view appears to be taken by Sheriff Fyfe in his "Code," pp. 120–1.

[6] A. B. *v.* Fraser, 1836, 14 S. 114.

[7] *See* A. S. 1839, s. 135.

[8] In this and the following sections dealing with the appointment of the agents for the poor, the word Sheriff does not include Sheriff-Substitute.

to meet to nominate a specified number of agents for the poor.[1] Notice of the order is given by a copy thereof being affixed on the walls of the Court-houses and Sheriff-Clerk's offices in the Sheriffdom.[2] At the meeting, the agents present by a majority of votes nominate the required number of agents, and cause the nominations to be reported to the Sheriff.[3] The Sheriff may confirm the nominations in whole or in part, or he may decline to do so.[4] He is not, however, entitled to exercise his power arbitrarily or in such a manner as would place the appointment of the agents in his hands, and he must either confirm the appointment of those nominated or have sufficient reason for declining to do so.[5] Thus, under a former Act of Sederunt, the provisions of which did not materially differ from those contained in the Act of 1907, it was held to be a good reason for declining to confirm the appointment of an agent, that he resided twenty miles from the seat of the Court.[5] Six days before the list is submitted to the Sheriff, the Sheriff-Clerk must notify each agent who has been nominated; such agent may, before the nominations are confirmed, represent to the Sheriff any reason why his nomination should not be confirmed.[6] In the event of the agents failing to nominate as thus provided for, or the Sheriff not confirming the nomination, the Sheriff may himself make the requisite nomination, or he may appoint another meeting to be held.[7]

*Duties of Agents for the Poor.*—The agents nominated act as agents for the poor in the Sheriffdom or the district in which they are appointed for one year, but they are eligible for renomination.[8] But after the lapse of the year an agent continues to act till the final issue of all causes which may have been assigned to him during his tenure of office.[9] The agents so nominated, as they themselves arrange or as the Sheriff may direct, act as procurators for the poor in all causes civil and criminal, including attendance at the Circuit Court.[10] The agents for the poor in their respective districts must also assist each other by taking precognitions or proofs on commission, or otherwise as may be requisite and

[1] Act, Rule 152; A. S. 1877, s. 2.
[2] Act, Rule 153; A. S. 1877, s. 2.
[3] Act, Rule 154; A. S. 1877, s. 3.
[4] Act, Rule 155; A. S. 1877, s. 3.
[5] Colquhoun *v.* Paterson, 1850, 12 D. 851.
[6] Act, Rule 156.
[7] Act, Rule 157; A. S. 1877, s. 4.
[8] Act, Rule 158; A. S. 1877, s. 2.
[9] Act, Rule 165; A. S. 1839, s. 135.
[10] Act, Rule 159; A. S. 1877, s. 6.

reasonable.[1] The Act of Sederunt of 1839 specifically provided that no person other than a procurator for the poor should conduct any case for a person admitted to the benefit of the poor's roll, but the Act of 1907 is silent on the point. Within six months after the close of his year of office, the agent must prepare a list of the poor cases in which he has acted, showing the amount recovered by him or his clients. This list is to be signed and sent to the Sheriff-Clerk, with a remittance of the amount of the fees, and from time to time he must remit any further fees recovered by him.[2]

*Liabilities of Agents for the Poor.*—Unless expenses are awarded against and recovered from the opposite party, the agent has no claim for fees; but the litigant is liable to him for actual outlays incurred with the litigant's sanction.[3] Nor is an agent acting for parties on the poor's roll liable for charges or allowances to witnesses, Sheriff-Clerks, auditors, shorthand writers, Sheriff-officers, or bar officers, unless they are recovered by the agent personally.[4] Neither the agent nor the litigant is liable for dues of Court or officer's fees, unless these are awarded against and recovered from the opposite party, in which case the litigant, or the agent, if he personally recovers the same, is liable.[5]

[1] Act, Rule 160; A. S. 1877, ss. 6, 7.
[2] A. S. 7th March 1908, s. 5.
[3] Act, Rule 166; A. S. 1839, s. 135.
[4] Act, Rule 167; A. S. 10th April 1908, s. 14.
[5] Act, Rule 168.

# CHAPTER XXIV

## EXECUTION UPON DECREE

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## Introductory

The party who has succeeded in obtaining decree in his favour may, by certain procedure, compel his opponent to make payment of the sum or sums for which decree has been granted. The nature of the proceedings upon the decree for enforcing or operating payment varies according as it is desired to proceed against his heritable estate, his moveable estate, or his person. The property against which it is desired to take proceedings for enforcing the decree may be either real or personal, and in the latter case may consist either of moveable goods in the unsuccessful party's hands, or of goods or debts due to him by third parties. The mode of attaching real or heritable property in payment of the sum for which decree has been obtained is by inhibition and adjudication, which are competent only in the Court of Session. Execution against the unsuccessful party's moveable estate or his person is competent in the Sheriff Court. In the former case his goods and effects may be pointed and sold, or by the diligence called arrestment and furthcoming any goods or money due to him may be secured. In the latter case he may be imprisoned. Execution against his moveable estate is carried out by a messenger-at-arms or a Sheriff-officer, selected and employed by the party holding the decree, the latter of whom can act only within the jurisdiction for which his commission is granted. Should the officer neglect or contravene his duty so as to defeat the effect of the diligence, both he and his cautioner may become liable for the debt.[1] The

[1] Couper *v.* Bain, 1868, 7 M. 102.

warrant may be executed within the jurisdiction of any Sheriff without endorsation by the Sheriff-Clerk of that jurisdiction, and either by an officer of the Court which grants the warrant or of the jurisdiction within which it is to be executed.[1]

## I. Extract of Decree

**Nature of Extract.** — Before the successful party can institute any proceedings to enforce the decree he has obtained against the unsuccessful party, he must first obtain an "extract," which is the official copy of the decree which he desires to put in execution. The old form of extracting decrees or final judgments, both of the Sheriff and the Supreme Courts, was by a written copy of the whole pleadings in the process, with the interlocutors and judgments of the Court following thereupon, a mode of extracting acts and decrees which was not only exceedingly burdensome but was attended with great expense. For this cumbrous and expensive form of extract a short form was introduced by Statute with reference to decrees in the Court of Session,[2] which had by practice come to be adopted in the Sheriff Court before legal sanction was given to the alteration by the Act of Sederunt of 27th January 1830. The form of extracts in the Sheriff Court is now regulated by the Sheriff Courts (Scotland) Extracts Act, 1892, which, however, repealed all former Statutes and Acts of Sederunt only so far as they might be inconsistent with its provisions. A reference to such preceding Statutes and Acts of Sederunt may therefore in certain cases be necessary.[3] The extract now contains only the date of the decree, the names of the parties to the action, and the terms of the decree, and concludes with a warrant for execution thereupon. It is signed by the Sheriff-Clerk on each page and is dated. Extracts for execution are issued only to the parties in right of the judgment, but any party interested may demand from the Sheriff-Clerk a full or more extended extract of a decree after it has become extractable.[4] Such extracts are frequently demanded by parties who require to use the proceedings as evidence in other Courts.

[1] Act, Rule 10.

[2] 50 Geo. III. c. 112.

[3] A. S. 27th Jan. 1830; Debtors (Scotland) Act, 1838, s. 9, and A. S. 8th Jan. 1881.

[4] Sheriff Courts Extracts Act, 1892, s. 6; A. S. 27 Jan. 1830.

**When Extract Competent.**—All final judgments may be extracted. Though nothing should be found due by them they may be extracted solely for the purpose of bringing the action to its proper termination. In order to fix what judgments are extractable, it is desirable, though it is no longer necessary,[1] to use the word "decern" in some part of the extractable interlocutor.[2] An interim decree could not formerly be extracted without leave of the judge,[3] and from the terms of section 32 of the Act of 1876 it has been thought that that section did not confer any extended authority.[4] In one case, however, it was decided in the Outer House that leave to extract an interim decree was abrogated by the terms of that section.[5] The phraseology of the section of the Act of 1907, which is free from the words which were thought to create some ambiguity in the clause of the Act of 1876, seems sufficiently comprehensive to include interim decrees as well as final judgments.[6] Where the interlocutor, though final otherwise, had not contained a decerniture for expenses, it was formerly held that the successful party by extracting his decree had waived his right to them,[7] and some doubt seems to have existed whether the Act of 1876 effected any alteration in the law. At all events, in an action where a final judgment on the merits had been first extracted, without any special leave, and the successful party then proceeded to have his expenses taxed and to have decree for them pronounced and extracted, the Court, while holding that this decree for expenses was not subject to appeal, gave no hint that it was in any way objectionable. No objection to it was however stated, and it appears to have been the interest of neither party to attack its validity on appeal.[8] The Act of 1907 would, however, appear to authorise such extract, since it provides that the extract of a decree for expenses may be issued after the lapse of seven days unless otherwise directed by the Sheriff,[9] while the decree in an ordinary action is extractable after the lapse of fourteen days, or at such earlier date as the Sheriff may allow.[10]

[1] Sheriff Courts Extract Act, 1892, s. 4.

[2] *See* Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1155, *per* Ld. Shand.

[3] Taylor *v.* Jarvis, 1860, 22 D. 1031.

[4] Dove Wilson, p. 291 note 2, and p. 323.

[5] Macintosh *v.* Young, 1886, 23 S.L.R. 634.

[6] Act, Rule 85.

[7] M'Lachlan *v.* Campbell, 1846, 8 D. 574.

[8] Tennants *v.* Romanes, 1881, 8 R. 824; *but see* Baillie *v.* Cameron, 1891, 28 S.L.R. 895.

[9] Act, Rule 98.

[10] Act, Rule 85.

Until, however, the matter is authoritatively decided, it would not perhaps be wise to assume that a successful party can extract a final judgment, to the effect of preventing an appeal by taking the action out of Court, while yet allowing the action to remain in Court for the purpose of getting his expenses taxed and decerned for. The proper course would appear to be to ask the Sheriff's leave to extract the judgment on the merits *ad interim*, a course which would at least possess the merit of obviating any possible misunderstanding.[1]

As showing the grounds and warrants on which the extract is founded, the material parts of the process required to authorise its issue must be, and remain, in the hands of the Clerk of Court. What parts of the process are in this sense material will depend on circumstances. The initial writ must always be essential. If the original petition were lost there could formerly be no extract, except by the consent of the opposite party, and in the absence of such consent the only remedy was an action of proving the tenor.[2] But under the provisions of the Act of 1876 a copy proved and authenticated to the satisfaction of the Sheriff might be substituted. Similarly, the want of any other "pleading" might be supplied.[3] But no provision was made by that Act for supplying the loss or destruction of the original interlocutor sheets,[4] and it was doubted whether their loss could be remedied by proving their tenor. The provisions of the Act of 1907 would, however, appear to remedy this defect, since it provides that when "any number of process," and not merely as in the case of the former Act "the petition or any other pleading," is lost or destroyed, a copy authenticated in such manner as the Sheriff may require may be substituted for the original.[5] Probably there are no parts of the process other than the initial writ and the principal interlocutor sheets which are in every case necessary,[6] though circumstances are conceivable where the loss or destruction of some other part of the process might be material, as for instance where the final interlocutor sustains a particular plea, and the pleading necessary to show what that plea is has gone amissing.

[1] *See* Dove Wilson, pp. 324–5.

[2] Mair *v.* Inglis, 1862, 24 D. 312; Forsyth *v.* Aird, 1853, 16 D. 205.

[3] Act, 1876, s. 11.

[4] *See* Cofton *v.* Cofton, 1875, 2 R. 599.

[5] Act, Rule 17.

[6] *See* White *v.* Arthur, 1865, 3 M. 1025.

**Time of Extract.**—Until the passing of the Court of Session Act of 1868, the time for issuing extract was regulated by the Act of Sederunt of 1839. Under it the time for extracting was six free days after final judgment, provided that if the taxation of expenses was contained in a separate interlocutor, forty-eight hours had elapsed from its date without appeal being taken,[1] and that no intention to appeal to the Court of Session had been intimated. The Sheriff had also power to allow extract to be issued at an earlier date, or to supersede it till a later period. Where an intention to appeal to the Court of Session was intimated, the Clerk could not issue the extract till fifteen days after the judgment. The Court of Session Act of 1868, in dealing with appeals, extended the time for extract to twenty days, and allowed it in all appealable cases, whether intention to appeal was intimated or not, and it took away the power of immediate extract.[2] The result thus was, that there were two times for issuing extract, one (of twenty days) for causes in which an appeal to the Court of Session was competent, and another (of six days) for those in which it was not, and that the power of allowing immediate extract, or extract before the normal time, was competent only in those causes which could not be appealed to the Court of Session. The Act of 1876, in dealing with decrees *in foro*, in the first place, shortened the period of extract to fourteen days in all cases; in the second place, declared that in no case should the period of extract be, without special leave, less than fourteen days; and, in the third place, restored the power of shortening the time of extract by special leave. The period of extracting a decree in absence was seven days, and there was no power of shortening in that case. Under the old forms the period for extracting always counted from the date of the final judgment, and when it became extractable it was requisite to count only forty-eight hours from the supplementary decree which taxed the expenses before extracting both together.[3] But under the Act of 1876 the normal period for a decree for expenses was the same as that for any other decree, the inconvenience thence resulting being remedied by the Sheriff allowing the decree taxing expenses to be extracted along with that on the merits, adding always (to prevent surprises)

[1] A. S. 1839, ss. 113, 114; Williamson *v.* M'Lachlan, 1866, 4 M. 1091.

[2] Court of Session Act, 1868, s. 68.

[3] Cruikshank *v.* Smart, 1870, 8 M. 512.

the proviso that the former should not be extracted in less than forty-eight hours from its pronouncing.[1]

The Act of 1907, in dealing with "ordinary" causes, substantially repeats the provisions of the Act of 1876, and provides that extract of any decree, interlocutor, or order of the Sheriff (other than a decree in absence or a decree for expenses) may be issued after the lapse of fourteen days from its date, or at such earlier date as the Sheriff may allow extract, provided, of course, that the decree has not meantime been appealed against.[2] Extract of a decree in absence may be issued after the lapse of seven days,[3] provided no reponing note have been lodged within that time, the lodging of such note acting as a sist of diligence, and so preventing extract till it has been disposed of,[4] and extract of a decree for expenses may be issued after the lapse of a similar period, unless otherwise directed by the Sheriff.[5] The normal period for extracting a supplementary decree for expenses is therefore not now the same as for any other decree, and the provisions of the Act greatly modify the inconvenience resulting from the former rule.

The power of superseding extract is analogous to that of sisting a process, and is exercised only in cases where the debtor is entitled to reasonable time before being called upon to pay.[6] The competency of superseding extract is not affected by the provisions of the Act of 1907, because the supersession of extract is virtually a condition made by the judgment, and forms part of the decree on the merits. The powers of shortening or lengthening the period for extract must be exercised by a distinct instruction embodied in the decree. Authority to issue the extract "on caution being found" was held not to authorise extract immediately on that being done, but to add a condition to the ordinary time.[7] The propriety of exercising such powers is dependent on the merits of the cause, and it is therefore unsafe to exercise them after the merits have been settled; to reopen a discussion on the merits would be, to say the least, irregular, if not improper.

In any question as to the time at which an extract was issued, it will always be presumed that its issue was not premature. It is,

[1] Dove Wilson, pp. 325–7.
[2] Act, Rule 85; Act, 1876, s. 32.
[3] Act, Rule 24; Act, 1876, s. 14.
[4] Act, Rule 32; Act, 1876, s. 14 (3).
[5] Act, Rule 98.
[6] Thomson *v.* Duncan, 1855, 17 D. 1081.
[7] Simpson *v.* Jack, 1888, 16 R. 131.

however, always open to the person against whom execution is being done to state the objection, without being subjected to the necessity of bringing a reduction of the extract.[1]

**Form of Extract.**—The extract must conform to the judgment and prior proceedings by which it professes to be authorised.[2] The form of extract contained in the Sheriff-Courts Extracts Act of 1892 must be followed so far as may be. It is, however, sufficient that the import or substance of the decree is given in the appropriate form provided by the Act, although the cravings or conclusions of the action or the decree itself may be expressed in different or more redundant language. No extract will be held invalid on account of form if it be sound in substance.[3] Thus, though the Statute contemplates that in the warrant the debtor is again to be mentioned by name, and that the sum is to be specifically repeated, a warrant referring to them as previously shown in the earlier part of the extract is not fatally irregular.[4] Where the Sheriff adheres to the decree of the Sheriff-Substitute, the date of the Sheriff's decree only need be given,[5] though probably if the date of the judgment ordering payment of the principal sum and expenses in the first instance be given, it would not be necessary to give the date of the judgment affirming it on appeal.[6] If the decree have a date at the beginning, and also a date of signing, the latter is the date to be given.[7] In the extract the decree must bear to have been given from the seat of the Court,[5] though the Sheriff may pronounce or sign any judgment or interlocutor when furth of his Sheriffdom.[8] Whether the decree has been pronounced by the Sheriff or the Sheriff-Substitute, the phrase to be used in the extract must be "Sheriff."[9] Where the extract contains more than one date, it is not necessary to specify what was done on each date, nor is it necessary to state by whom

[1] Badger *v.* Blantyre, 1844, 17 Jur. 53; Grindlay *v.* Saunders, 1830, 8 S. 642.

[2] Stair, iv. 1. 45; Ersk. iv. 2, 6; Dickson on Evidence, s. 1258.

[3] Sheriff Courts Extracts Act, 1892, s. 11.

[4] Hanna *v.* Neilson, 1849, 11 D. 941.

[5] Sh. Cts. Exts. Act, 1892, General Directions.

[6] *See* Thomson *v.* M'Donnell, 1841, 3 D. 1167; Williamson *v.* M'Lachlan, 1866, 4 M. 1091.

[7] Cleland *v.* Clark, 1849, 11 D. 601; 1850, 7 Bell's Ap. Ca. 153.

[8] Act, Rule 83. Though it may have been the intention of the Act to limit this power to the case of the Sheriff to the exclusion of the Sheriff-Substitute, no such limitation is imposed by the terms of the rule.

[9] Sh. Cts. Exts. Act, 1892, Gen. Directions.

the extract has been written or collated.[1] The specific decree, warrant, or order craved for in the initial writ will be embodied in the extract,[2] and the nature of the debt (such as, that it is for aliment) must be stated in the extract in all cases where the payment of the debt can be enforced by imprisonment.[1] In any case where imprisonment is competent, a fiat or warrant of imprisonment must first be obtained in terms of the statutes.[1] If there be no decerniture for interest, it will run on sums decerned for from the date of the decree,[3] and where interest is included in a decree or extract, it is deemed to be at the rate of five per cent. unless otherwise stated.[4] A decree for expenses includes decree for the expenses of extracting it,[5] and the dues of extract are added to the expenses decerned for, the total being inserted in the extract.[6] The extract is not issued under seal, but is authenticated by the Clerk of Court on each page, and by a docquet at the end also signed by him, in which the number of pages of the extract and any alterations or marginal additions are mentioned. Erasures in an essential part of the extract are fatal to it, and in any event should never be permitted in any part though not essential, since a party doing diligence on such a document might subject himself in claims for damages.[7]

**Warrant embodied in Extract.**—The warrant for execution, which was at one time contained in a separate writ, is now embodied in the extract of the decree. If the decree extracted is for the payment of money, or amongst other things for the payment of money, the debtor is charged to pay the sum or sums of money, principal, interest, and expenses specified in the extract, within the appropriate days of charge, under pain of poinding (and also under pain of imprisonment where the debt is of such nature as the payment thereof may be enforced by imprisonment); and warrant is granted to arrest the goods, debts, and sums of money of the debtor in payment or satisfaction of the sum or sums contained in the extract. If the debtor fail to obey the charge, warrant is granted to poind and distrain his goods and effects in payment of the sum or sums contained in the

[1] Sh. Cts. Exts. Act, 1892, Gen. Directions.

[2] Act, Sched. I., Form A.

[3] Wallace *v.* Henderson, 1876, 4 R. 264.

[4] Sh. Cts. Exts. Act, 1892, s. 9.

[5] Act, Rule 98; Rutherglen P. C. *v.* Glenbucket P. C., 1896, 33 S.L.R. 368 (O.H.); Orr *v.* Smith, 1891, 28 S.L.R. 589; *see also* Williams *v.* Carmichael, 1874, 11 S.L.R. 530.

[6] Sh. Cts. Exts. Act, 1892, Gen. Directions.

[7] Dove Wilson, p. 329.

extract, and for that purpose, if necessary, to open shut and lockfast places.[1] If the decree extracted is for the performance of an act or implement of an obligation other than the payment of money, the warrant charges the debtor to perform the act or implement the obligation within the appropriate days of charge, under pain of imprisonment.[2] Where an interlocutor, ordaining the defender to make consignation of certain sums of money, failed to specify any particular time for implement of the decree, but the extract stated the time as seven free days, it was held in a suspension that the provision of the section last quoted authorised the insertion of the induciæ in the warrant.[3] If the decree be for the payment of money, and also for the performance of an act or implement of an obligation, the debtor is charged in both of the preceding ways.[4] Where the party to be charged is furth of Scotland, the warrant authorises an edictal charge of fourteen days.[5] Imprisonment for civil debt is now generally incompetent, and the warrant in the ordinary case contains therefore no mention of that penalty. The cases in which imprisonment is still competent, and in which therefore the extract contains a warrant to charge under pain of imprisonment, are those in respect of (1) Taxes, fines, or penalties due to His Majesty, and rates and assessments lawfully imposed; (2) sums decerned for aliment; and (3) Decrees *ad facta præstanda*. Care must be taken that the time given to the debtor to make payment is the proper period, which, as will be seen, is seven free days. There is nothing in the Act of 1907 to suggest, nor does there appear to be any ground for thinking, that the Sheriff has any discretionary power of shortening or extending the days of charge. The warrant authorises only the remedies of poinding and arrestment, and if the creditor desires payment out of the arrested funds a further application must be made to the Court.

**Second Extract.**—A party may obtain as many extracts of the decree as he chooses to pay for. If the first extract has been lost or is defective, a second may be obtained; but a defective extract cannot be amended in the Sheriff Court as it can in the Court of Session.[6]

[1] Sh. Cts. Exts. Act, 1892, s. 7 (1).
[2] *Ibid.*, s. 7 (2).
[3] M'Lintock *v.* Printzen and Others, 1902, 4 F. 948.
[4] Sh. Cts. Exts. Act, 1892, s. 7 (3).
[5] *Ibid.*, s. 7 (6).
[6] *See* Edington *v.* Astley, 1829, 8 S. 192; Dickson on Evid., s. 1260.

## II. Execution of Decree

(A) *Against Debtor's Heritable Estate*
(B) *Against Debtor's Moveable Estate*
(C) *Against Debtor's Person*

### (A) against debtor's heritable estate

1. *Inhibition*
2. *Adjudication*

**Inhibition** is a writ passing under the signet whereby the debtor or party inhibited is prohibited from contracting any debt which may become a burden on his heritable property, or whereby his heritage may be attached or alienated to the prejudice of the inhibiting creditor's debt. Letters of inhibition may be obtained on production of the decree (or, when inhibition on the dependence is sought, of the initial writ) in the Bill Chamber of the Court of Session, when a *fiat* is granted thereupon, in respect of which the letters of inhibition may be signeted. Where inhibition on the dependence is obtained, the warrant may be served at the same time as the initial writ, or at any time thereafter; but to render such diligence competent the initial writ must contain pecuniary conclusions other than those for expenses.[1] Inhibition is executed against the debtor personally, or at his dwelling-house if within Scotland,[2] or if furth of Scotland at the office of the Keeper of the Record of Edictal Citations. A notice of the inhibition may be placed on the Register of Inhibitions, and, provided the inhibition and its execution are duly registered within twenty-one days from the date of the registration of the notice, the inhibition takes effect from the date when the notice was registered. Otherwise it takes effect only from the date of the registration of the inhibition and its execution. Inhibition strikes only against voluntary deeds of the debtor posterior to its completion, and not against debts or deeds resulting from obligations previously contracted. It is an inert prohibition, purely negative in its operation, and in order to give himself an active right the creditor must follow up his inhibition by adjudication. Inhibition

[1] Weir *v.* Otto, 1870, 8 M. 1070.

[2] *See* Morton *v.* Smith, 1902, 9 S.L.T. 336 (O.H.).

on the dependence may be recalled or restricted, with or without caution, by the Lord Ordinary on the Bills, subject to the review of the Court. A defender in an action, on the dependence of which inhibition has been used, is entitled, on the action being settled before the summons is called, to have the inhibition discharged at the cost of the pursuer.[1] Similarly, a pursuer who abandons an action must bear the cost of discharging an inhibition laid on by him in dependence of the action.[2] Inhibitions prescribe in five years, but they may be renewed for additional periods of five years by again recording the inhibition itself, or a memorandum in the form statutorily prescribed.[3]

**Adjudication** is the modern real diligence for attaching land and other heritable estate in satisfaction of debt. The creditor raises an action of adjudication in the Court of Session, founding upon the decree he has obtained, and inhibition may either precede or follow the action. The decree in the action adjudges the debtor's heritable estate to the creditor for payment and satisfaction to him of the principal debt and interest down to the date of decree, and also of interest on the accumulated sum during the non-redemption of such heritage. An abbreviate of the decree is recorded within sixty days in a register appointed for the purpose. A decree of adjudication is equivalent to a conveyance by the person *in titulo* to grant such conveyance of the lands or subjects therein contained; and the adjudger may complete feudal titles to the lands by infeftment on such decree as a conveyance, or by using it, for the purpose of infeftment, as an assignation of an unrecorded conveyance. Such infeftment also implies entry with the superior. The right of the adjudger is redeemable in ten years, and the redemption may be effected by the creditor's intromissions with the rents and profits; but the debtor, before he can redeem the subject adjudged, must pay the debt and a fifth part more. The adjudication may be made the ground of an action of maills and duties, by which the adjudging creditor will obtain possession of the rents; but in that case he must account by a rental, and he will be liable in strict diligence in the recovery of the rents. The adjudger's right is rendered irredeemable

[1] Milne *v.* Birrell, 1902, 4 F. 879; *following* Robertson *v.* Park, Dobson, & Co., 1896, 24 R. 30.

[2] Robertson, 1896, 4 S.L.T. 174 (O.H.).

[3] *See* Titles to Land Consolidation (Scotland) Act, 1868, secs. 155–6; A. S. 18th Nov. 1871; Bell's Dict., 530; Mackay's Prac., i. 68, 379.

by a decree of declarator of expiry of the legal, which is obtained in an action raised after the period of redemption, in which action the debtor is required to redeem the lands or to be foreclosed. In this action the debtor is entitled to insist that the creditor shall account for the rents and profits he has drawn, so as to have the precise balance ascertained. Until decree of expiry of the legal the debtor remains vassal, and the adjudger's right is not one of property, but a mere *pignus prætorium*.[1]

### (B) EXECUTION AGAINST DEBTOR'S MOVEABLE ESTATE

#### (a) *The Charge*

The charge is the technical name for the formal requisition to pay, which, after the decree has been extracted, is embodied in the appropriate document and served upon the debtor at the instance of the creditor. It is served by a messenger-at-arms or an officer of Court, and purports to be a command in the name of the Sovereign and of the Sheriff of the county, or of the latter alone, ordering the debtor to pay the debt, interest, and expenses set forth in the decree within a certain specified time.

**At whose Instance.**—The charge is given at the instance of the creditor. If he have assigned his interest, the assignee must endorse on the extract a minute, signed by himself or his agent, craving authority to charge arrest and do other diligence at his own instance. On presentation of the minute to the Clerk of the Court from which the extract issued, along with the evidence of the mode in which his right to the extract was acquired, and if there be no lawful cause to the contrary, the requisite authority is given by the Clerk writing after the minute the words *Fiat ut petitur*, with the date and his subscription. He endorses the same date on the documents produced and initials it.[2] In whatever way the right to the extract has been acquired, whether by assignation, by confirmation as executor, by marriage as a husband, by sequestration as a trustee, the mode of obtaining authority to do diligence is the same. If the creditor be furth of Scotland he does not require to sist a mandatary to enable him to do diligence, though, if the diligence be

[1] *See* Bell's Dict., p. 15 *et seq.*; Mackay's Prac., ii. 327.

[2] Debtors' (Scotland) Act, 1838, s. 12.

suspended he might require to sist a mandatary in the suspension.[1]

**Essentials of Charge.**—It is essential that the terms of the charge be in exact conformity with those of the decree under which it is given. The decree must be correctly referred to by the names of the pursuer and defender and its date.[2] The date on which the extract was issued is not essential, though it is generally given.[3] Great care must be exercised to ensure that the debtor is not charged to pay any sum in excess of that which he actually owes, and if he have paid anything to account of the debt care must be taken to give him due credit for such payment.[4] The time allowed for payment is that specified in the warrant contained in the extract. Under the provisions of section 8 of the Act of 1876 a charge upon seven days' induciæ was competent and sufficient, except in cases in which under statutory provisions in force prior to the passing of the Act a shorter period was competent, or in those in which the Sheriff might see fit to shorten the period so as to ensure special dispatch. The Act of 1907, while it repeals that of 1876, makes no corresponding provision either with reference to the induciæ necessary upon a charge or to the power of the Sheriff to fix the induciæ in cases requiring special despatch. The matter would therefore appear to be regulated by the Sheriff Courts (Scotland) Extracts Act of 1892, which though it does not specifically enact that the induciæ of the charge shall be seven days, appears clearly to contemplate that period if the defender be within Scotland, and fourteen if he be furth thereof.[5] That Act, however, confers no power upon the Sheriff to shorten the induciæ, and therefore it would seem that no such proceeding is now competent. In order that it may appear when the time will expire, the date of the charge is, of course, essential.[6] If the debtor or his moveables are within the Sheriffdom of any Sheriff other than the Sheriff from whose books the extract is issued, the extract must be presented in the Court of such other Sheriff along with a minute praying for his concurrence to the execution of the warrant within his jurisdiction;

[1] Ross *v.* Shaw, 1849, 11 D. 984; Chambers *v.* Chambers, 1839, 1 D. 911; *see supra*, "Mandataries."

[2] Beattie *v.* M'Lellan, 1844, 6 D. 1088; Graham *v.* Bell, 1875, 2 R. 972.

[3] *See supra*, p. 353.

[4] *See* M'Martin *v.* Forbes, 1824, 3 S. 275.

[5] See Sched. I. of the Act.

[6] Beattie *v.* M'Lellan, 1844, 6 D. 1088; Graham *v.* Bell, 1875, 2 R. 972.

if there be no lawful cause to the contrary, the Sheriff-Clerk grants authority by writing a deliverance *Fiat ut petitur*, and dating and subscribing it, after which the warrant may be executed as though it had originally been issued from the books of the concurring Sheriff.[1] The curious anomaly that while under the provisions of section 10 of the Act of 1907 a warrant of citation or a warrant or precept of arrestment proceeding upon a depending action, may now competently be lawfully executed within the jurisdiction of any Sheriff without indorsation by the Sheriff-Clerk of that jurisdiction, no such provision is made with reference to the execution of a charge, would appear to show that the omission, like that with reference to the inducie, has been made *per incuriam*. The charge is written, or partly written and partly printed, and is authenticated by the signature of the officer.[2]

**Service of Charge.**—The charge may be served by the officer as soon as the extract is issued, and is served upon the debtor or debtors mentioned in the decree. In Scotland a firm is a legal person, distinct from the partners of which it is composed; but under the provisions of Partnership Act of 1890 an individual partner may be charged on a decree or diligence directed against his firm.[3] A company, corporation, association, or firm, or a board corporate or unincorporate, may be competently charged under its nominate or descriptive name at its principal place of business (which term includes the office or place of business of the clerk or secretary of any board or corporation); or where its principal place of business is furth of Scotland, at any place of business in Scotland.[4] Some slight confusion appears to be created by the terms of an earlier rule of the Act. Rule 11, which, in terms of its rubric, professes to deal with the "*citing* of corporations," provides that a corporation or association, or a firm nominate or descriptive, or a board corporate or unincorporate, may have *summary* diligence upon a decree or a decree of registration executed against it under its nominate or descriptive name. What precisely the rule contemplates as "summary" diligence is not at first sight quite apparent. It would, however, appear, from the fact that the diligence competent upon a decree of Court is not summary in its nature, while that

[1] Debtors' (Scotland) Act, 1838, s. 13.
[2] Debtors' (Scotland) Act, 1838, s. 32; 9 & 10 Vict. c. 67, s. 1.
[3] Partnership Act, 1890, s. 4 (2).
[4] Act, Rule 151.

competent upon a decree of registration (that is, upon a liquid document of debt, such as a bill), is correctly described and technically known as "summary," that the word summary in the rule has, partly perhaps owing to a confusion of ideas arising from the juxtaposition of the words "summary" and "diligence," and perhaps partly to an error of draughtsmanship, become displaced, and that what the rule intended to provide was that "diligence on a decree of a Sheriff-Court or summary diligence upon a decree of registration," may be executed against firms, corporations, etc., in their nominate or descriptive name. If this construction of the rule be sound, as there seems obviously sufficient reason for so regarding it, the terms of the two rules become entirely consonant. The terms of the section would therefore also appear to amend the presently existing law relating to summary diligence on a liquid document of debt, by permitting such diligence against a firm, corporation, etc., to be executed against it in its nominate or descriptive name.[1]

The place and mode of service, and the regulations as to the presence of a witness, are exactly the same as in the case of the service of the initial writ, except that postal service of the charge does not appear to be competent, in respect that the provisions of the Citation Amendment Act of 1882 (except to a limited extent upon a Small Debt decree) do not apply to the execution of a charge.[2] Where the debtor is furth of Scotland, the charge may be executed edictally on fourteen days' induciæ in the same manner as a warrant of citation.[3] In the event of there being any irregularity either in the charge itself or in the mode of its execution, the defect may be remedied by the creditor withdrawing the charge by letter and giving a new charge.[4]

**Execution of the Charge.**—After service of the charge the officer fills up a certificate that he has done so, in the form provided by the Debtors Act of 1838, which is signed by himself and the witness, and is known as the execution of the charge. The execution recites the words of the charge, and describes the time and mode of service. Diligence is not necessarily vitiated by a clerical error in the execution,[5] but as the execution is the foundation for all further

[1] *See* Banking Law, 3rd ed., p. 171–3.

[2] *See* Gow & Son *v.* Thomson, 1895, 1 Adam, 534.

[3] Act, Rule 15.

[4] Clark *v.* Hamilton, 1875, 3 R. 166. *See also* Henderson *v.* Rollo, 1871, 10 M. 104.

[5] Henderson *v.* Rollo, *sup.*

diligence, care should be exercised to see that it is free from errors.

**Registration of Execution.**—The execution may be registered in the books of the Court from which it is issued, by presenting the extract and its execution to the Clerk of Court any time within a year and a day of the expiry of the charge. The execution is thereupon entered in the Register of Hornings of the Court, the effect of which is to accumulate the debt and interest into a capital sum, on which interest thereafter becomes due.[1]

### (b) *Poinding and Sale*[2]

**Nature of Poinding.**—Poinding is the means by which the moveable effects of a debtor who has been charged to pay and has failed to make payment, are made available for payment of the debt. Under former practice[3] the effects themselves were adjudged to the creditor. A value was placed on them, at which they were indeed tendered back to the debtor; but since a person unable to pay his debts was seldom in a position to purchase his effects at the valuation placed upon them, the result generally was that the goods became the property of the creditor at their appraised value in payment of his debt. According to modern practice, if the debtor is unable to redeem his effects at their appraised value, they are offered for sale by public auction, and do not become the property of the creditor unless no one can be found at the sale to purchase them at their appraised value.[4]

**Subjects of Poinding.**—All the goods and moveable effects of the debtor found in his possession, in that of his servants or others as custodiers for him, in public places, or in the possession of the creditor himself,[5] may be poinded. Moveable effects only can be poinded, and debts due to the debtor, within which category are included bills, banknotes, and even coin,[6] cannot be made the subject of such diligence. The special power conferred by the Exchequer Act of 1856 of poinding the whole moveable effects of the debtor

[1] Debtors' (Scotland) Act, 1838, s. 10.

[2] The proceedings are still regulated by the Debtors' (Scotland) Act, 1838, s. 23 *et seq.*, and the following account of them is substantially that contained in Dove Wilson, pp. 335 *et seq.*

[3] *See* Ersk. iii. 6, 20.

[4] Debtors' Act, 1838, ss. 26, 27.

[5] Lochhead *v.* Graham, 1883, 11 R. 201.

[6] *See* Alexander *v.* M'Lay, 1826, 4 S. 439.

"without exception, including banknotes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds," applies only to Crown debts.[1] Negotiable documents cannot therefore be made the subject of poinding, and as they cannot be arrested[2] they can only be recovered from the debtor under the Bankruptcy or Cessio Acts.[3] There are, however, certain exceptions in regard to the goods that may be poinded. Thus ships, for no very intelligible reason, are attached by arrestment.[4] Implements used in agriculture for tilling the ground, and the horses and oxen used for drawing them, cannot be poinded during the tillage season, unless other effects cannot be found.[5] Goods or effects in which the debtor has only a joint interest,[6] or a temporary interest such as a liferent,[7] cannot be poinded; but to prevent fraudulent claims of this kind, effects found in the debtor's possession are presumed to be his until the contrary is proved. Effects subject to a right of hypothec cannot be poinded if the person possessed of the right of hypothec objects, unless security be given for the whole of the debt secured by the hypothec.[8] If, however, such effects be inadvertently poinded, it would appear to be sufficient to restore them or pay their value.[9] Where the period for the payment of such a debt is past, sufficient security will be given if effects enough to meet it be left.[10] If the poinding creditor pays or finds security for the secured debt, he is entitled to an assignation of the right of hypothec,[11] but it is illegal for him to poind greatly more than his own debt, in order to pay out of the proceeds both it and the secured debt.[12] It is sometimes difficult to tell whether an article is moveable or not. Thus it has been held that growing corn is moveable if it be nearly ripe,[13] but not if it has only brairded.[14] Grass and green crops, which a tenant is bound to consume on the land, probably could not be poinded.

[1] 19 & 20 Vict. c. 56, s. 32.

[2] *See infra*, Arrestment.

[3] Debtors' Act, 1880, s. 12; Bank. and Cessio Act, 1881, s. 13.

[4] *See* Arrestment and Sale of Ships, *infra*.

[5] Act, 1503, c. 98; Ersk. iii. 6, 22; Ld. Adv. *v.* Forgan, 20th Feb. 1811, F.C. (Appx. No. 1).

[6] Fleming *v.* Twadle, 1828, 7 S. 92; Glen *v.* Cameron, 1896, 3 S.L.T. 361 (O.H.)

[7] Scott *v.* Price, 1837, 15 S. 916.

[8] Pringle *v.* Scott, 1736, M. 6216; Jack *v.* M'Caig, 1880, 7 R. 465.

[9] *See* Millar *v.* Ballingall, 1888, 5 S.L.Rev. 29 (Sh. Berry).

[10] Hay *v.* Keith, 1623, M. 6188.

[11] Crawford *v.* Stewart, 1737, M. 10,531.

[12] M'Kinnon *v.* Hamilton, 1866, 4 M. 852; Hamilton *v.* Emslie, 1868, 7 M. 173.

[13] Ballantyne *v.* Watson, 1709, M. 10526.

[14] Elder *v.* Allan, 1833, 11 S. 902.

**Time of Poinding.**—The full days of the charge must have expired before the poinding can be executed. How long the creditor may delay after the execution of the charge has not been expressly settled by decision; but poindings have been sustained which were not executed for three or four years after the charge was given.[1] It may, however, be stated categorically that the poinding of a debtor's goods should be completed by sale with all reasonable dispatch. Thus, where a creditor executed a poinding of his debtor's effects but took no steps to complete his diligence by sale for sixteen months, prior to the termination of which the debtor took out cessio, it was held that the poinding was ineffectual to found a preference in the poinding creditor.[2] The limit of a year and a day for registering the execution of the charge does not affect the power of poinding. The poinding must take place during the day, and at latest it must be begun before sunset and executed during daylight.[3]

**Execution of Poinding.**—The poinding is executed at the place where the effects are found. If the officer cannot obtain access to them, he may open shut and lockfast places, since the warrant implies authority to do so.[4] At the place where the poinding is effected the officer reads his warrant and demands payment of the debt. If payment be offered, either by the debtor or any one on his behalf, either when payment is demanded or at any time before the poinding is completed, the proceedings must be discontinued, and if the officer has no authority to receive payment, the money must either be taken to the creditor or consigned in a bank. The officer has no authority to accept payment in the absence of special instructions, and a debtor who makes payment to an officer unauthorised to receive it will be liable in repetition to the creditor in the event of the officer failing to account to him. The amount which must be tendered is the sum or sums contained in the extract decree, not including the expense of the charge and attendance at the poinding. If the latter expenses are not tendered along with the sum in the decree, the creditor must bring another action for them. The debtor, or the person making payment, is not entitled to delivery of the extract, but he is entitled to see such a

[1] Kerr *v.* Barbour, 1837, 15 S. 1041.

[2] Henderson *v.* Grant, 1896, 23 R. 659.

[3] Douglas *v.* Jackson, 1695, M. 3739.

[4] Sheriff Courts Extracts Act, 1892, s. 7 (1).

marking made on it as will prevent its being made use of for the execution of further diligence.[1] The tender of a cheque is probably not sufficient to warrant the officer in suspending the poinding, especially if there be no means of ascertaining whether the cheque is likely to be honoured on presentation.[2] If no tender be made, the officer proceeds to inventory the effects and to have them valued. The appraisement is effected by two valuators, whom the officer appoints by administering an oath *de fideli*. The valuation must be specific, each article or set of articles being kept separate.[3] A poinding was held to be bad because a trunk and its contents were valued at a lump sum.[4] The effects are poinded to the value both of the debt contained in the decree and of the expenses of the diligence. The invariable practice, the legality of which is established, is to include the expenses of the diligence, since if the poinding is followed by a sale such expenses can be taxed in due course, and there is therefore nothing to be gained by leaving their settlement to a future action.[5] At the conclusion of the poinding the effects are offered to the debtor at their appraised value. A tender of the appraised value of the effects, even if it be less than the amount of the debt, must be accepted by the creditor, whether it be made by the debtor or any one else. If the effects be bought back they cannot be again poinded for the same debt.[6] If there be no payment, the officer then leaves a schedule of the poinded goods with the person in whose possession they were poinded, leaving the poinded effects also in his possession,[7] and warning all parties present of the consequences which will follow if they in any way interfere with the poinded effects.

**Interruption of Poinding.**—If any person claim any of the effects as his, the officer may examine him or his witnesses on oath, and if satisfied that the effects claimed are not the debtor's, he may discontinue the poinding. If the person claiming the effects produce a written title to them, it has been said that the officer, even if he be not satisfied, must desist from the poinding or make a

[1] Inglis *v.* M'Intyre, 1862, 24 D. 541.

[2] *See* Caithness Flagstone Co. *v.* Thriepland, 1907, 15 S.L.T. 357 (O.H.).

[3] Le Conte *v.* Douglas, 1880, 8 R. 175.

[4] M'Knight *v.* Green, 1835, 13 S. 342.

[5] M'Neill *v.* M'Murchy, 1841, 3 D. 554.

[6] Fiddes *v.* Fyfe, 1791, Bell's 8vo Ca. 355.

[7] Debtors' Act, 1838, s. 24.

special report on the point.[1] A person interrupting a poinding by a claim of this kind is liable in damages if his claim turn out to be ill-founded,[2] though no liability for the debt, as such, is incurred. But a person who interrupts a poinding by force is liable to punishment, and to make good the value of the goods.[3] If the debtor object he may prevent a sale under an illegal poinding by lodging objections to the poinding; if a third person is aggrieved by having his effects poinded for the debt of another person, he may obtain his remedy in the same way or by interdict, and he will further be entitled to payment of all damages he may have sustained.[4] In practice the officer usually completes the poinding according to his instructions, and leaves the claimant to vindicate his claim.

**Conjoining Creditors.**—To prevent expense in unnecessary competitions between creditors, it is provided that where an officer proceeds to poind at the instance of any creditor, he must conjoin in the poinding any other creditor who exhibits and delivers to him a warrant to poind. The claim to be conjoined must be made before the first poinding is completed, and the officer then proceeds to poind sufficient effects to meet both debts. The poinded effects are appraised as in the ordinary case, and one valuation is sufficient.[5] If the poinding has been completed before the second creditor has had an opportunity of being conjoined, such creditor must, if he desires to share in the proceeds, take steps to have the debtor sequestrated or made notour bankrupt under the Bankruptcy Acts.[6]

**Report of the Poinding.**—The officer must report the execution of the poinding to the Sheriff within eight days, unless cause be shown for requiring a longer period.[7] The execution must specify the diligence under which the poinding was executed, the amount of the debt, the names and designations of the debtor and of the poinding creditor, the effects poinded and their value, the names and designations of the appraisers and of the person in whose hands the goods were left, and the fact of the delivery of the schedule to him. The

[1] Menzies' Lects., 3rd ed., p. 308, on the authority of Breadalbane *v.* Sinclair, 1687, M. 10522, the decision in which is not, however, conclusive.

[2] Arnot *v.* Dowie, 1863, 2 M. 119.

[3] Ersk. iii. 6, 27.

[4] Lindsay *v.* E. of Wemyss, 1872, 10 M. 708; Lamb *v.* Wood, 1904, 6 F. 1091; Dove Wilson, p. 340; Graham Stewart on Diligence, p. 354.

[5] Debtors' Act, 1838, s. 23.

[6] Bankruptcy Act, 1856, ss. 7, 12.

[7] Debtors' Act, 1838, s. 25; Miller *v.* Stewart, 1835, 13 S. 483.

execution is subscribed by the officer and the two valuators, who must be witnesses of the poinding.

**Custody of Effects between Poinding and Sale.**—On the execution being reported to the Sheriff, it is competent for him to give such orders for the security of the moveables as he may find necessary. Under this power he may give orders for their removal from the custody of the debtor, if there is reason to fear that they will not be safe in his possession. If the articles are of a perishable nature the Sheriff may provide for their immediate disposal, under such precautions as he may think fit.[1] Any person unlawfully intromitting with or carrying off the poinded effects is liable to be imprisoned until he restore them or pay double the appraised value. This power may be exercised on a summary complaint being made, either to the Sheriff of the county where the effects were poinded, or to that of the domicile (residence) of the person who interfered with them.[2] The form of complaint may be similar to that for breach of interdict. The words summary complaint mean a summary application to the Sheriff *ad factum præstandum*, which requires dispatch. The complaint is a civil and not a criminal process, and therefore does not require the concurrence of the Procurator-Fiscal.[3]

**Fixing and Advertising Sale.**—When required, the Sheriff grants a warrant for the sale of the poinded effects, the requisition being usually made by the poinding officer when reporting the poinding. The warrant is always granted unless cause to the contrary is shown. A debtor desirous of stopping the proceedings at this stage must suspend; and neither an arrestment of the poinded effects in the debtor's hands[4] nor the dependence of a petition for cessio at the instance of the debtor[5] is of any avail to prevent the granting of the warrant of sale. The warrant fixes the notice to be given of the sale, and the time and place at which it is to be held, and names a judge of the roup at whose sight the sale is to be carried out. The notice is left to the discretion of the Sheriff, and varies according to the nature and value of the articles to be sold, but in general will conform to that which a prudent seller would give with reference to the sale of effects belonging to himself. The sale must take place not

[1] Debtors' Act, 1838, s. 26.
[2] *Ibid.*, s. 30.
[3] Wilson *v.* M'Kellar, 1896, 24 R. 254.
[4] Ferguson *v.* Bothwell, 1882, 9 R. 687.
[5] Simpson *v.* Jack, 1888, 16 R. 131.

sooner than eight nor later than twenty days after the notice. Thus a sale advertised on the 10th, is competently carried out on the 18th of the same month.[1] The hour as well as the day of the sale should be fixed in the warrant, since an unsuitable hour might affect the sale as adversely as an unsuitable day.[2] The place of sale is also within the discretion of the Sheriff, but the place chosen will generally be that most suitable for all parties equally. These matters must all be specifically fixed by the Sheriff and embodied in the warrant, a warrant to sell within a specified period, leaving the notice, the time, or the place to be filled in by the officer, being inept.[3] The Sheriff orders a copy of the warrant of sale to be served on the debtor, and also on the person in possession of the poinded effects, if he be not the debtor, at least six days before the date of sale.[4] Such a warrant, though incidental to the carrying out of diligence, may be served by post.[5]

**Conduct of the Sale.**—At the sale the effects are offered at upset prices, not less than the appraised values. If the appraised value be offered the effects must be sold, and the poinder or any other creditor is at liberty to buy.[6] If no offerer appears, the effects, or such part of them as, according to the appraised value, may be necessary to satisfy the debt, interest, and expenses due to the poinding creditor or creditors, is delivered over to them or their authorised agent. The Act declares that notwithstanding this delivery, the effects remain, subject to the claims of other creditors, to be ranked as by law competent;[7] but as the goods when thus delivered pass from the custody of the Court, the right to such ranking, where the bankruptcy laws give it, must be made good in separate proceedings.

**Report of Sale.**—Within eight days after the day of sale the judge of the roup reports the proceedings to the Sheriff.[8] If the goods have been delivered that fact must be reported; if, however, the effects or any of them have been sold, he lodges, also within eight days, the roup rolls, or certified copies of them, with the Sheriff-Clerk,

[1] M'Neill *v.* M'Murchy, 1841, 3 D. 554.

[2] *See* M'Kinnon *v.* Hamilton, 1866, 4 M. 852.

[3] M'Vicar *v.* Kerr, 1857, 19 D. 948; Kewly *v.* Andrew, 1843, 5 D. 860.

[4] Debtors' Act, 1838, s. 26; *see* as to perishable articles, *sup.*

[5] Lochhead *v.* Graham, 1883, 11 R. 201.

[6] Debtors' Act, 1838, s. 29.

[7] *Ibid.*, s. 27.

[8] Debtors' Act, 1838, s. 28; Miller *v.* Stewart, 1835, 13 S. 483.

together with an account setting forth the whole proceeds arising from the sale and the expenses which attended it. The report must be remitted to the Auditor to tax the expenses, and afterwards be approved of by the Sheriff. The Sheriff may order the whole or the net proceeds to be lodged in the hands of the Sheriff-Clerk as he may see cause. This power is of great utility where other creditors have made claims to be ranked along with the poinding creditor, because while the money remains in the hands of the Court the Sheriff may decide between the competitors and apportion the money according to their several rights, without the expense of new proceedings, in the same way as in a multiplepoinding. If consignation is not ordered, or if after consignation no cause be shown to the contrary, the Sheriff orders payment of the sum to the poinding creditors, or so much of it as may be necessary to meet the debts and expenses. The creditors receiving payment take it subject to the right of other creditors to share with them under the Bankruptcy Acts;[1] but that right after the money is paid over must be made good in new proceedings.

**Register of Poindings.**—The Sheriff-Clerk keeps a register of all poindings, and is bound to show the report of any poinding, with the relative documents, to all concerned, on payment of a fee of one shilling.[2]

### (C) *Arrestment and Furthcoming*

**Arrestment in Execution,** like that in security, is the diligence by which a debtor in a moveable debt or obligation is interpelled from making payment or delivery to his creditor until the debt due to the arrester by the arrestee's creditor is paid or secured. The party in whose hands the arrestment is used is called the arrestee, the user of the arrestment is called the arrester, and the arrester's debtor is called the common debtor, because where, as usually happens, there are two or more competitors for the arrested fund or subject, he is debtor to all of them. Arrestment as a diligence is *per se* inchoate; the *nexus* imposed by the arrestment does not operate as a transfer of the debt or subject to the arrester, except in the case of arrestments upon an extract decree of the Court of Exchequer.[3] In order that the subjects arrested shall be transferred to the creditor,

[1] Debtors' Act, 1838, s. 28.
[2] *Ibid.*
[3] *See* 19 & 20 Vict. c. 56. s. 30.

as in a poinding, an action of furthcoming at the instance of the arrester is necessary, in which the arrestee and the common debtor are called. If there be no competition, and no objection on the part of the common debtor, decree of furthcoming in the arrester's favour will be granted. If, on the other hand, several arrestments have been used by other creditors of the common debtor, the appropriate method by which the rights of the parties is determined is by an action, not of furthcoming, but of multiplepoinding. But until an arrestment has been completed by a decree of furthcoming, the transfer of the subjects arrested is imperfect and the diligence is liable to be defeated. Once, however, that decree has been pronounced, it has the same effect in transferring the property of the debtor to the creditor as a completed poinding.[1] But in competitions between arrestments, none of which has been followed by a decree of furthcoming, they rank with each other according to their respective dates, though when thus inchoate they cannot compete with a poinding,[2] or with a sequestration under the Bankruptcy statutes, or with a confirmation as executor-creditor,[3] or, indeed, with any other transfer complete in itself.

**Subjects of Arrestment.**—Generally, all debts or goods due or belonging to the debtor may be arrested in the hands of the persons who are due to pay or deliver them to him. Practically, any debt other than a heritable one,[4] which is due to the debtor may be arrested in the hands of his debtor. Thus the price of goods sold may be arrested in the hands of the buyer;[5] money lodged in bank may be arrested in the hands of the bank; the debtor's share of a company's stock may be arrested in the hands of the company;[6] the debtor's interest in a life policy in the hands of the insurers;[7] a ward's funds in the hands of his factor.[8] Where money is lodged

[1] Muirhead *v.* Cowie, 1735, M. 687.

[2] Bell's Com., 5th ed. ii. 64.

[3] Wilson *v.* Fleming, 1823, 2 S. 430.

[4] Debts secured on heritage remain moveable until infeftment is taken, and in the interval they may be arrested; Act 1661, c. 51, Stewart *v.* Dundas, 1706, M. 705. The unpaid interest of a heritable debt, or the price of heritage sold, is arrestable. Dove Wilson, p. 345 (note).

[5] Crs. of Bonjedward, 1753, M. 743.

[6] Sinclair *v.* Staples, 1860, 22 D. 600, *approved in* American Mortgage Co. of Scot. Ld. *v.* Sidway, 1908, S.C. 500. In the incorporating acts and charters of some companies there are special provisions against the arrestment of stock.

[7] Bankhardt's Trs. *v.* Scot. Amicable Life Ass. Socy., 1871, 9 M. 443. The payment of a new premium does not necessitate a new arrestment.

[8] Mitchell *v.* Scott, 1881, 8 R. 875.

on deposit receipt in the names of two persons, the receipt being taken payable to either or the survivor, and an arrestment is lodged with the bank arresting all sums of money due to one of the depositors, the bank is not in safety to pay the sum contained in the receipt to the other. An averment on the part of the bank that they were aware that the money deposited, though lodged in joint name of two people, really belonged to the one to whom payment was made, and not to that person against whose funds arrestment in their hands was used, is irrelevant. A deposit receipt is not a document of title, and no inference can be drawn from the terms in which the money is deposited as to the ownership of the money. The bank therefore, in the event of the fund being arrested as belonging to one of the parties, is not bound to pay it to the other party, because for anything that appears *ex facie* of the receipt the fund may belong either wholly or in part to the former, and to pay it to the latter therefore might be to defeat the rights of creditors.[1] Certain funds cannot, however, be made the subject of arrestment. Thus money which has been consigned and set apart for a special purpose cannot be arrested so as to defeat that purpose.[2] Alimentary funds are similarly exempt from arrestment, at least to the extent required for the maintenance of the person entitled thereto,[3] as are the wages of workpeople in so far as they do not exceed £1 per week.[4] The rule does not, however, apply to alimentary debts, nor to rates and taxes imposed by law. Some moveable subjects are, by charter, statute, or special destination, not arrestable, as, *e.g.*, the original stock of the Royal Bank of Scotland, annuities to widows of ministers of the Church of Scotland, of writers to the Signet, etc. Debts due by bill of exchange, as well as the *ipsa corpora* of the bills themselves, are not arrestable.[5] Future debts, *i.e.* debts not due until after the arrestment is used, are not attached by the diligence. This does not, however, include

[1] Allan's Exr. *v.* Union Bank of Scotland, 1908, S.C.; *distinguishing* Anderson *v.* N. of Scot. Bank, 1901, 4 F. 49.

[2] *See ante* Consignation; *see* Brit. Linen Bank *v.* Kansas Invest. Co., 1895, 3 S.L.T. 208, 320 (O.H.); Brown *v.* Port Seton Harbour Comrs., 1899, 1 F. 373.

[3] Smith *v.* Bell, 1855, 17 D. 778; *see* Kidstons Watson Turnbull & Co. *v.* M'Farlane's Trs., 1904, 12 S.L.T. 722 (O.H.); Thomson *v.* Thomson, 1905, 42 S.L.R. 711.

[4] Wages Arrestment Limitation Act, 1871; *see* M'Murchy *v.* Emslie & Guthrie, 1888, 15 R. 375.

[5] Dick *v.* Goodall, 1st June 1815, F.C.

debts the obligation for which is already incurred, but the term of payment only has not arrived. Arrears of rent and interest and the current term's rent and interest may be arrested; but an arrestment used on the term-day to attach the ensuing term's rent is premature.[1] Arrestments, however, of current rents are always to a certain extent contingent, since the efficacy of the arrestment depends on whether the common debtor is *in titulo* to exact them at the term of payment; his right being defensible by adjudgers, or other singular successors acquiring right to the lands, and consequently to the rents, in the intermediate period. In like manner, where the subject the rents of which have been arrested *currente termino* has been a donation *inter virum ex uxorem*, the arrestment may be defeated by a revocation of the gift by the husband or wife.[2]

With regard to the goods to which the debtor has right, there is sometimes some difficulty in saying when they are liable to arrestment and when they should be attached by poinding. The subject arrested must not be in the possession of the common debtor himself, or of his servant, or of any one who is a mere custodier for him, and if the arrestee possess them simply for the debtor and have no right of any kind to retain them as against him, arrestment is not the proper diligence.[3] If, however, the arrestee be properly the debtor of the common debtor, or if he possess the goods in such a capacity as to give him the right of retention as against the debtor, goods may in general be arrested in his hands. Thus arrestment of goods in the hands of a factor for the party who is indebted to the common debtor,[4] or in the hands of a clerk of goods belonging to his employer,[5] is ineffectual. But an arrestment in the hands of a carrier or of a manufacturer is good.[6] The principle has not, however, been carried out strictly to its logical conclusion by the Court; and where the custody is of a short or temporary character the power of arrestment in the hands of the custodian has not been conceded. Thus a parcel is not arrestable in the hands of a porter, nor is a horse in the hands of a farrier,[7] or in those of the innkeeper in whose

[1] Wright *v.* Cunningham, 1802, M. 15,919.

[2] Bell's Dict., *s.v.* Arrestment.

[3] Ersk. iii. 6, 5.

[4] *See* Campbell *v.* Faikney, 1752, M. 742; Trowsdale's Tr. *v.* Forcett Rly. Co., 1870, 9 M. 88.

[5] Burns *v.* Bruce, 1799, Hume, 29; Cunninghame *v.* Home, 1760, M. 747.

[6] Matthew *v.* Fawns, 1842, 4 D. 1242; N. B. Rly. Co. *v.* Whyte, 1881, 9 R. 97.

[7] Neilson *v.* Smith, 1821, Hume, 31.

house the owner is staying.[1] The question whether articles coming into the possession of procurators-fiscal and other officers of justice in the course of proceedings are subject to arrestment has not been expressly decided, though the practice of arresting such articles is common.[2] Where, however, there is no right of retention at all there can be no arrestment. Thus furniture in a house let furnished cannot be arrested in the hands of the tenant.[3] Where, on the other hand, there is a clear right of retention there is a clear right of arrestment. Thus it has been held that money consigned with the Clerk of Court in a civil action is arrestable at the instance of *inter alios* the creditor of the consignor, in so far as not required for the purpose for which it was consigned.[4] A statutory exception to the rule was enacted by Section 40 of the Sale of Goods Act, 1893, which provides that in Scotland a seller of goods may attach them while in his own hands or possession by arrestment or poinding, such arrestment or poinding having the same operation and effect, in a competition or otherwise, as an arrestment or poinding by a third party. This, however, is the only case in which a person may arrest goods in his own possession. Where the custodian of the goods is in possession of them for the purpose of selling them, and accounting to the debtor for the proceeds realised, they may be effectually arrested in his hands, the goods being properly out of the debtor's possession. Thus, where a debtor went abroad, leaving behind the furniture in his house, with instructions to an agent to sell it, an arrestment used in the agent's hands was held good.[5]

**In whose hands Arrestment used.**—The leading rule on the subject is that the arrestment must be used in the hands of the debtor to the common debtor. The arrestee must be directly indebted to the debtor, and not to some intermediate party. The warrant of arrestment may therefore be served on any of the defender's debtors, or on any person, other than a servant of the defender or other person having possession of his effects solely as his representative, who has in his possession property or effects belonging to the defender. Thus a creditor whose debtor has funds at his credit at a branch of a bank cannot validly attach such funds by an arrestment used in the hands of the agent of the bank, but must arrest them in the hands of the

[1] Hume *v.* Baillie, 1852, 14 D. 821.
[2] Stuart *v.* Cowan, 1883, 10 R. 581.
[3] Davidson *v.* Murray, 1784, M. 761.
[4] Pollock *v.* Scott, 1844, 6 D. 1297.
[5] Brown *v.* Blaikie, 1850, 13 D. 149; *see also* Macfarlane *v.* Forrester, 1823, 2 S. 505: Todd *v.* Smith, 1851, 13 D. 1371.

bank itself.[1] If, however, the agency were of such a character that the agent might be sued personally for the money, an arrestment used in his hands would validly attach any funds of the debtor in his possession.[2] Again, where the defender occupies two positions, arrestment of the funds belonging to him in one capacity is of no avail in an action against him in another capacity. So in actions against trustees in their trust capacities, arrestment of the private funds of the trustee is incompetent, the arrestee being due nothing as trustee. On the same principle, where the arrestee occupies two capacities the character in which he is alleged to be debtor must be correctly set forth in the execution of the arrestment, and an arrestment used against him in one capacity is not habile to attach funds or debts due by him in the other. Thus an arrestment used in the hands of a liquidator of a company cannot validly attach the funds of the company or of the individual partners if it be used in the hands of the liquidator not *qua* liquidator but as a private individual, without reference to the fact that the firm whose assets it is desired to arrest is in liquidation; to arrest the funds of a company in liquidation it is necessary to arrest the debt as due by the company itself and the liquidator as such.[3] On the same principle, in one case it was decided that an arrestment served on an individual partner for a company debt was invalid.[4] That case was, however, decided prior to the passing of the Partnership Act, which provides (1) that "notice" to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as "notice" to the firm, except in the case of a fraud on the firm committed by or with consent of the firm;[5] and (2) that in Scotland, where a firm is a legal person distinct from the partners composing it, an individual partner may be charged on a decree or diligence directed against the firm.[6] The phraseology of the former section would not, however, appear to be wide enough to cover an arrestment for a company debt being used against the managing partner. But the wording of the latter section is somewhat obscure. According to what would appear to be its plain meaning, an individual partner may be "charged on a diligence" directed against the firm. As

[1] Graham *v.* Macfarlane, 1869, 7 M. 640.

[2] Ritchie *v.* MacLachlan, 1870, 8 M. 815.

[3] Burns *v.* Gillies, 1906, 8 F. 460.

[4] Hay *v.* Dufourcet, 1880, 7 R. 972.

[5] Partnership Act, 1890, s. 16.

[6] *Ibid.*, s. 4 (2).

will be seen, a charge is not a necessary preliminary to arrestment, and, as the section appears to contemplate only a charge on a diligence, arrestment would appear to be outwith its scope. Where the debtor has a claim against some person, who in turn has a claim against some second person, such as, *e.g.*, a trustee, arrestment in the hands of such second person is invalid.[1] But this does not necessarily involve that the arrestee must be the person who has incurred the debt due to the debtor, since it is enough if he be a person against whom the debtor could maintain an action for his debt. Thus the arrestee may be a trustee under the Bankruptcy Statutes, a general factor and commissioner,[2] an executor[3] or other legal administrator, of the person indebted to the debtor. In an action which was directed against certain trustees, they being called as defenders *qua* trustees, the extract decree contained a warrant to arrest the goods, etc., of the defenders. The trustees were superseded by a judicial factor, but it was held that the extract was sufficient warrant for the execution of an arrestment of the goods in the hands of the judicial factor.[4] The arrestee must further be indebted to the debtor at the actual time when the arrestment is used, any property or debt for which liability attaches subsequent to the arrestment being unaffected by it. Thus an arrestment of consigned goods used before their delivery to the consignee is ineffectual, since prior to their delivery the consignee is under no obligation to account for them.[5] Similarly an arrestment used in the hands of a person in process of completing his title as executor, in which capacity when completed the debtor would have a claim against him, is bad. On the same principle, an arrestment of rents and interests, as has been seen, covers only arrears and the rent and interest for the current term.[6] The arrestee must be carefully designed, and an arrestment used in the hands of "Sibbald Brothers" instead of "Sibbald Brothers & Co." has been held bad.[7]

**How Arrestment used.**—A charge is not a necessary prerequisite to an arrestment.[8] The Citation Amendment Act of 1882 does not

[1] Campbell *v.* Faikney, 1752, M. 742.

[2] Ersk. iii. 6, 4; *see* Carron Co. *v.* Currie & Co., 1896, 33 S.L.R. 578 (O.H.).

[3] Globe Ins. Co. *v.* Mackenzie, 1850, 7 Bell's Ap. Ca. 296.

[4] Brown's Jud. Factor *v.* Brown, 1902, 10 S.L.T. 165 (O.H.).

[5] Stalker *v.* Aiton, 1759, M. 745.

[6] Wright *v.* Cunningham, 1802, M. 15919; Livingston *v.* Kinloch, 1795, M. 769; Smith *v.* Burns, 1847, 9 D. 1344.

[7] Henderson's Trs. *v.* Lang, 1831, 9 S. 618.

[8] Weir *v.* Falconer, 2nd Feb. 1814, F.C.

apply to the execution of an arrestment, and consequently service of the arrestment must still be executed by an officer. The arrestee is served with a schedule which narrates the extract-decree under which the arrestment is used, and if the schedule has not been personally served upon the arrestee a copy must be sent by postal registered letter to the last known place of abode of the arrestee.[1] If such place of abode is unknown, or if the arrestee is a firm or corporation, it must be sent to the arrestee's principal place of business if known, or if not known to any known place of business of the arrestee. The officer in his execution must certify that this has been done, and specify the said address.[2] An arrestment used in the hands of a municipal corporation is validly executed by delivery of a copy to a servant of the corporation at its proper place of business, *i.e.* at the City Chambers.[3] The schedule, besides specifying the extract decree by reference to the parties and dates, states the amount which is arrested, and may particularise the fund or other moveable property attached. In practice it usually arrests a sum not exceeding the amount of the debt, and all goods, gear, and effects belonging to the debtor which are in the hands of the arrestee. The schedule may also specify the particular debt which the arrestee is due to the debtor, or the particular article belonging to the debtor which the arrestee has in his hands; and this, as has been observed, is a prudent course to adopt where there is any suspicion that the arrestee may not be unwilling to misunderstand the arrestment.[4] But in any event the schedule must specify that the effects arrested are the debtor's property.[5] The execution must state the facts and dates accurately, and an error in specifying the date of a decree as the 13th instead of the 30th was held to be fatal.[6] Rule 10 of the Act of 1907 does not appear to apply to the case of an arrestment, and an arrestment therefore, unlike a citation or a charge, can be executed in the jurisdiction of a Sheriff other than that issuing the warrant only upon indorsation by the Sheriff-Clerk of the county in which it is to be executed. The execution of the arrestment is made out by the officer, and it must be reported "forthwith" by the agent to the Sheriff-Clerk.[7]

**Effect and Breach of Arrestment.**—An arrestee who in

[1] Act, Rule 126; Act, 1876, s. 12 (5).

[2] Act, Rule 126.

[3] Campbell *v.* Watson's Tr., 1898, 25 R. 690.

[4] Dove Wilson, p. 350.

[5] *See* Marshall *v.* Robertson, 1905, 21 S.C.R. 243.

[6] Graham *v.* Bell, 1875, 2 R. 972.

[7] Act, Rule 127.

defiance or disregard of the arrestment pays the sum or delivers the effects arrested to the common debtor is liable in damages to the arrester to the extent of the funds paid away and expenses, a liability which is established by a separate action.[1] Breach of arrestment does not, like breach of interdict, necessarily infer contempt of Court,[2] though it may be visited by an arbitrary fine as a disregarding of proceedings taken under the authority of the Court. But the arrestment creates no real right entitling the arrester to vindicate the subject from third parties acquiring it *in bona fide*. The arrestee will not, however, be liable in second payment, and still less in any penalty, if he has paid his creditor or parted with possession of the arrested effects under circumstances which preclude the reasonable possibility of his having been aware of the arrestment.[3] On the death of the arrestee the arrestment subsists to the effect of supporting an action of furthcoming, while his heir remains in possession of the subject; and it may be renewed against such heir, so as to give a preference to the arrester over an arrester in the hands of the heir. As the arrestee's representatives are held to be not bound to know of the arrestment, it should, on the arrestee's death, be used over again in their hands.[4] An arrestment also subsists after the death of the common debtor, and on the death of the arrester remains effectual to his heir. Since in competition arrestments are preferable according to their dates, the execution should specify the hour at which the arrestment was used. But all arrestments used within sixty days before, and four months after the constitution of notour bankruptcy, rank *pari passu*; while arrestments used posterior to the four months cannot compete with prior arrestments though they rank with each other or any reversion of the fund attached.[5] Sequestration is equivalent to an arrestment in execution and decree of furthcoming, and no arrestment used within sixty days of sequestration is effectual.[6]

**Recalling and restricting Arrestment.**—It is competent for the Sheriff, on the petition of the debtor or defender duly intimated to the creditor, to recall or restrict the arrestment, with or without caution,[7] as may appear to the Sheriff to be just, provided that

[1] Ersk. iii. 6, 14.

[2] Inglis *v.* Smith, 1867, 5 M. 320.

[3] Laidlaw *v.* Smith, 1841, 2 Rob. Ap. Ca. 490.

[4] Aberdeen *v.* Scot's Crs., 1738, M. 774, 775.

[5] Bankruptcy Act, 1856, s. 12; *see* Wallace's "Manual of Bankruptcy," pp. 37–39.

[6] *i.e.* in competition with it; *ibid.*, s. 108.

[7] *See* Ellis *v.* Menzies & Co., 1901, 9 S.L.T. 204 (O.H.).

answers are allowed to be given in to the petition. The matter is then disposed of summarily, the Sheriff's judgment being subject to review by the Court of Session.[1] It is not competent in a petition for recall of the arrestment to determine whether the funds belong to the arrestee, and if he disputes the validity of the arrestment his course is to await and defend the action of furthcoming, or if that course be inconvenient to raise an action of multiplepoinding.[2]

**Prescription of Arrestment.** — An arrestment in execution prescribes in three years, and unless within that period the usual action of furthcoming or some other action such as multiplepoinding be raised, the arrestment falls.[3]

**The Action of Furthcoming** is the action by which the arrestment is made available to the arrester. It is brought at the instance of the creditor, calls the arrestee and the common debtor as defenders, and may proceed either upon an arrestment in security, after the decree has been obtained, or upon an arrestment in execution used upon the decree. An action of furthcoming may be competently raised before the debt arrested is payable to the common debtor.[4] If the arrestment has been used on the dependence of the action, it is not necessary that it should be used a second time upon the decree.[5] It may now be raised in the Sheriffdom where the fund *in medio* is situated, or in that to whose jurisdiction the arrestee or the holder of the fund is subject, although the common debtor may not reside within either jurisdiction.[6] Formerly, however, the action was competent only in the Court to whose jurisdiction the arrestee was subject.[7] Now, however, the arrester has a choice of jurisdictions, subject to the provision that the Sheriff may upon sufficient cause, and by interlocutor stating his reasons, remit the cause to another Sheriffdom,[8] which in his opinion may be a more convenient *forum* for disposing of the question. When the arrester himself proceeds to make his claim effectual, he does so by means of the action of furthcoming, in which he concludes for payment to him of the debt due by the arrestee to the debtor, or of so much of it as may suffice to pay his debt and the expenses

[1] Debtors' Act, 1838, s. 21.

[2] Vincent *v.* Chalmers' Tr., 1877, 5 R. 43.

[3] Debtors' Act, 1838, s. 22; *see* Jameson *v.* Sharp, 1887, 14 R. 643.

[4] Jameson *v.* Sharp, *sup.*

[5] Benhar Coal Co. Liqid. *v.* Turnbull, 1883, 10 R. 558.

[6] Act, Rule 128; Act, 1876, s. 47.

[7] Act, 1876, s. 47.

[8] Act, Rule 20.

of the arrestment. Where, on the other hand, the arrestee is desirous of ascertaining whom he ought to pay, or where second arresters wish to ascertain their rights, the procedure is by action of multiplepoinding. In the action of furthcoming, if goods have been arrested, the initial writ should conclude for a warrant to sell them and to apply their proceeds in payment of the arrester's debt.[1] An arrestment used on the dependence of an action entitles the arrester in the action of furthcoming to claim all expenses laid out in the action on the dependence of which the arrestment is used. And in an action of multiplepoinding the expenses of the process come out of the fund *in medio*. But the expenses of an action of furthcoming could not formerly be made good out of the arrested effects.[2] Now, however, under the provision of the Act of 1907, this anomaly has been removed, and in an action of furthcoming the expenses of bringing the action are deemed to be part of the arrester's claim, which may be made good out of the arrested fund or subject.[3] Actions of furthcoming and of multiplepoinding are now, therefore, alike in this respect. Either the arrestee or the common debtor or both may lodge defences. The arrestee may state all competent objections to the arrestment, and he may plead against the arrester every defence which he could have pleaded in answer to an action by the common debtor. He cannot, however, plead defences competent only to the common debtor, provided the debt has been properly constituted. The common debtor, on the other hand, may state any objections which would have been competent to him had he been sued directly for the debt, and he can besides question the validity of the arrestment. In defence to an action of furthcoming, the arrestee is therefore limited to an averment and proof that the arrestment has not validly attached anything, but he cannot dispute the debt due by the common debtor to the arrester.[4] But it is necessary to prove both the debt arrested and the debt on which the arrestment proceeds; the former is a question between the arrester and the arrestee, and if the arrestee deny his liability to the debtor there may be a litigation with reference to it of the same kind as if he were being directly sued for it. Where the debt

[1] Valentine *v.* Grangemouth Coal Co., 1897, 35 S.L.R. 12; Lucas's Trs. *v.* Campbell and Scott, 1894, 21 R. 1096.

[2] *See* May *v.* Malcolm, 1825, 4 S. 76.

[3] Act, Rule 129.

[4] Houston *v.* Aberdeen Town and County Bank, 1849, 11 D. 1490.

has been constituted by writing, the written obligation may be recovered from the common debtor by a diligence; or where there is no proof it may be referred to the oath of the arrestee. While, again, the debt due by the common debtor to the arrestee must be proved, the action is competent to the common debtor alone (who is therefore always made a party to the action of furthcoming), the arrestee having no interest in such action.[1] Any person interested in the fund may come forward and state defences, but where there is a claim which competes with the arrestment an action of multiplepoinding is the appropriate remedy. When the furthcoming is defended a record is made up, and if necessary a proof is allowed, the procedure being as near as may be that in an ordinary action where defences have been lodged.[2] Where the arrestment has been loosed on caution, the remedy is a direct action against the cautioner, to which the arrestee and the common debtor are called as parties. In actions of furthcoming there is an important exception to the ordinary rules of evidence. In general a reference is competent only to the oath of the opposing party, but in actions of furthcoming the arrestee may refer his defence against the arrester to the oath of the common debtor, by whose oath the arrester is bound.[3]

**Arrestment of Ships.**—As has been mentioned, arrestment is the appropriate diligence for attaching a ship. Even while a vessel remains on the stocks in an unfinished state, arrestment is the only diligence by which she can be attached for debt.[4] There is a special form of precept for maritime arrestments, although the ordinary warrant contained in the extract decree is sufficient.[5] The arrestment is effected by the officer affixing the schedule to the mainmast, or if there be none to the sternpost of the vessel and chalking the Royal initials above it in the presence of the witness. If the vessel be in harbour[6] and there be any danger of its removal, the officer may dismantle it,[7] though in doing so he must exercise great care, since he is responsible for any damages that may result.[8] A ship may be arrested for the debt of a part owner.[9] Once the ship has

[1] Houston *v.* Aberdeen Town and County Bank, *sup.*

[2] Act, Rule 132; Act, 1876, s. 25 (4).

[3] Ersk. iii. 6, 16; *see ante*, Reference to oath.

[4] Mill *v.* Hoar, 18th Dec. 1812, F.C.

[5] Clark *v.* Loos, 1853, 15 D. 750.

[6] Petersen *v.* M'Lean, 1868, 6 M. 218.

[7] *See* Eng. Coasting Co. *v.* Brit. Finance Co., 1886, 13 R. 430.

[8] Kennedy *v.* M'Kinnon, 1821, 1 S. 198.

[9] M'Aulay *v.* Gault, 6th March 1821, F.C.

started on a voyage she cannot be arrested and brought back.[1] The arrestment is completed by the bringing of an action of sale against the owners of the ship, by virtue of the decree in which the ship is sold by public roup; the proceeds are thereafter applied in payment of the arrester's debt.

### (C) AGAINST DEBTOR'S PERSON

Imprisonment for civil debt is now generally incompetent. In certain excepted cases it is, however, still competent, and in such cases the nature of the debt in respect of which warrant to imprison is sought must be stated in the extract.[2] Imprisonment for debt is now competent only—

(1) For payment of taxes, fines, or penalties due to His Majesty, imprisonment in such cases being competent for a period not exceeding twelve months.[3]

(2) For payment of rates and assessments lawfully imposed, imprisonment being competent in such cases for a period not exceeding six weeks in respect of the rates and assessments imposed in any one year.[4]

In each of these cases a warrant of imprisonment may be obtained after registration of the execution of the charge, by a minute endorsed on the decree in the form of Schedule 8 annexed to the Debtors' (Scotland) Act, 1838. The minute must be signed by the party or his agent, and upon it the Sheriff-Clerk grants a fiat, which is executed by a Sheriff officer.[5] The various statutes imposing taxes, etc., generally prescribe the special procedure to be adopted for their recovery, and this procedure is generally followed.

(3) For payment of sums decerned for as aliment, in which cases the imprisonment, which proceeds not upon the extract decree but upon a special warrant granted by the Sheriff, is competent only if the debtor is unable to prove to the satisfaction of the Sheriff that his failure to pay is not wilful.

Imprisonment as a means of enforcing a decree for aliment will be considered later.

[1] Carlberg *v.* Borjesson, 1878, 5 R. (H.L.) 215.

[2] Sheriff Courts Exts. Act, 1892, *general directions.*

[3] Debtors' (Scotland) Act, 1880, s. 4.

[4] *Ibid.*, s. 4; Civil Imprisonment (Scot.) Act, 1882, s. 5.

[5] Debtors' Act, 1838, s. 11; Sheriff Courts Exts. Act, 1892, *general directions.*

## III. Execution of Scots Decrees in England and Ireland, and *vice versa*

### (*a*) execution in england or ireland

Prior to the passing of the Judgments Extension Act, where it was desired to enforce a decree of the Court of Session either in England or Ireland, it was necessary to apply for and obtain a decree conform from the English or Irish Courts, a procedure which involved not only considerable delay but also expense. The Judgments Extension Act of 1868 greatly facilitated the enforcement in the sister kingdom and in Ireland of decrees obtained in the Court of Session, by providing that simple registration in certain registers, followed by a certificate by the keeper of the Register, should have the same effect as a decree conform, registered, and extracted formerly had. That Act, however, applied only to judgments of the Supreme Court, but by the Inferior Courts Judgment Extension Act of 1882 the same principle, subject to certain restrictions, has been extended to those of the Sheriff Courts. The remedy by registration is not, however, complete though the transition has begun, and though the opinion was hazarded many years ago that no great time was likely to elapse before the divisions between the three countries would present no barriers to the recovery of just debts, that opinion has not (at least as yet) been justified by events.[1] The remedy is still, as it was then, hampered by certain inconveniences and defects. The chief inconvenience arises from the necessity for commencing proceedings anew for every different district of the sister country, while the main defect of the statute is that diligence on a registered judgment is competent only against "goods and chattels," the use of arrestment to attach debts being excluded. It was, however, just observed that, from the manner in which the Act and its relative rules had been framed, the defects and inconveniences were likely to be felt less in enforcing Scots decrees in the sister countries than in the enforcing of the decrees of their Courts in Scotland,[2] an opinion which the working of the Act has proved to be well founded.

**Decrees Enforcible.**—The decree must be for "debt, damages,

[1] Dove Wilson, p. 354.

[2] Dove Wilson, p. 354.

or costs," pronounced either in the Ordinary or the Small Debt Court.[1] The phraseology of the section is wide enough to comprehend every kind of decree for payment of money, with the exception of those for payment of fines, and to include both interim and final decrees. The decree must not, however, have been pronounced against a person domiciled in England or Ireland at the commencement of the action, unless (1) the whole cause of action has arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of the Sheriff Court; and (2) the initial writ has been served upon the defender personally within such district.[2] The enforcement of any decree, to which the Act does not apply, by registration in the register of an inferior Court in England or Ireland, may be prohibited or restrained by application for an injunction against its enforcement to one of the superior Courts in England or Ireland.[2] Before, however, a judgment can be enforced by registration, the time for appealing must have elapsed, or if an appeal having the effect of staying execution has been taken, it must first have been disposed of.[3] "Appeal" includes those to the Sheriff and to the Court of Session. Where the judgment is not subject to appeal, the provision as to allowing time for one to elapse does not apply. The decree should also be extracted. In the case of an interim decree extract would appear to be essential, since without it there is no certitude that the interlocutor may not be recalled when the final judgment comes up on appeal. In the case of a final judgment, the mere expiry of the period during which appeal is competent, without such appeal being taken in certain cases, makes the judgment *ipso facto* no longer appealable; but since, according to Scots legal phraseology and practice, a "judgment on which diligence can be done" means an "extracted decree," it would appear to be inadvisable for a Sheriff-Clerk to grant the necessary certificate upon an unextracted decree. After the lapse of a year from the date of the judgment no certificate can be granted, because after the lapse of that time none would be available for registration.[4]

**Certificate of Judgment.**—The person holding a decree to

[1] Inf. Courts Judg. Exten. Act, 1882, s. 2.

[2] *Ibid.*, s. 10; see Hudson *v.* Innes and Grieve, 1908, 24, Sh. Ct. Reps. 190.

[3] *Ibid.*, s. 3.

[4] *Ibid.*, s. 4. Under the Judgments Extension Act of 1868 the time for registering a Court of Session judgment may be extended.

which the terms of the Act apply may apply to the Sheriff-Clerk for a certificate in the form provided by the Act. The certificate can be granted only on proof that the judgment has not been satisfied. The English County Court Rules provide that in England a registrar may, if necessary, demand an affidavit to this effect, but both the statute itself and the relative Act of Sederunt are silent on the point. The proof must therefore presumably be to the satisfaction of the Sheriff-Clerk. If satisfied, the Sheriff-Clerk then issues the certificate, in which are set forth the name, business or occupation, and address both of the person obtaining the judgment and of the person against whom it is given, together with the name of the Court, the date of the judgment, and the amount of the decree, distinguishing the costs and stating shortly the nature of the claim or demand. The Sheriff-Clerk then signs the certificate and seals it with the seal of the Court.[1] Certain fees are payable to the Sheriff-Clerk and to the law agent who takes out the certificate,[2] and as these are recoverable from the debtor, their amount should be endorsed on the certificate. Similarly, if the judgment has been partly satisfied, the amount paid should be endorsed. The Sheriff-Clerk is apparently bound to issue as many successive certificates as may be required, provided on each occasion it is proved to him that the judgment has not been satisfied and that a year has not elapsed from the date of the decree.

**Registration in English or Irish Court.**—In England the certificate (being presented within a year of the date of judgment) is registered either in the Court of Common Pleas at Westminster, or in the desired County Court, according to the amount decerned for.[3] It is registered in the County Court, unless the claim or demand exclusive of costs exceeds in pecuniary value the amount which might competently be recovered in an action commenced in an English County Court, in which case it must be registered at Westminster. The jurisdiction of the English County Courts extends in the ordinary case of debts or damages to claims not exceeding £50. In Ireland, the certificate must in like manner be presented either in the Court of Common Pleas at Dublin, or in one of the Civil Bill Courts, the jurisdiction of the latter extending to actions arising under contracts, and to actions for debts and damages,

[1] Inf. Courts Judg. Ext. Act, 1882, s. 2, Sch.

[2] A. S. 7th March 1883, Sch. B.

[3] Inf. Courts Judg. Ext. Act, ss. 4, 9.

to the value of £50.[1] The certificate may be presented either by the creditor or his agent. There must be a written note of presentation,[2] and when presented to the County Court Registrar there must be appended to it a description of the place within the jurisdiction of the Court in which the goods and chattels of the debtor are. The Registrar then takes possession of the certificate, seals and retains it, inserting it in a minute-book. A copy of the certificate and note, prepared by the creditor, is then sealed and dated and returned to him.[3] The cost of registration, which is provided for under the rules, must be endorsed on the certificate. Upon registration of the certificate, the Registrar of the County Court issues to the High Bailiff of the Court a warrant of execution in the form usually used,[4] no proceeding analogous to the Scots charge being apparently necessary. The warrant empowers the bailiff to seize the goods and chattels of the debtor, and also his money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialities or securities for money, all to the extent necessary to satisfy the execution. The seizure of the goods may be followed by the usual steps for converting the effects to the use of the creditor. If the proceedings are taken at Westminster, the effect will be similarly limited to seizing goods and chattels and documents of debt. So in Ireland, the like effects of the debtor may be seized. The proceedings in the Irish Civil Bill Courts are identical with those in the English County Courts, the Clerk of the Peace coming in place of the Registrar.[5]

**Control over Execution.**—The English and Irish Courts have the same control and jurisdiction over the execution of any registered Scots judgment as they have over the execution of any judgment in their own Courts. If it be proved that the Scots judgment has been set aside or satisfied, the registration may be cancelled by order of the Registering Court.[6]

[1] 40 & 41 Vict. c. 56, s. 50.

[2] Inf. Courts Judg. Ext. Act, 1882, Sch.

[3] Eng. County Court Rules, 1889, Order XLV.

[4] 45 & 46 Vict. c. 31, Form 315.

[5] Irish County Court Rules, 7th June 1883.

[6] Inf. Courts Judg. Ext. Act, 1882, ss. 6, 7.

(*b*) EXECUTION OF ENGLISH OR IRISH JUDGMENTS IN SCOTLAND

**Judgment and Certificate.**—The judgments of those Courts in England and Ireland which have jurisdiction to hear and determine civil causes, other than the High Courts of Justice, may be registered in the Sheriff Courts of Scotland. These include—in England, the County Courts and the City of London Courts; in Ireland, the Civil Bills Court, the Courts of Petty Session, and the Bankruptcy Court. The provisions with regard to the lapse of the time during which appeal is competent, to the time for registration, and to the form of certificate, are the same as those for Scots judgments.

**Registration and Execution.**—At each of the places in Scotland at which an ordinary Sheriff Court is held, a register must be kept, in one of which the creditor or his Law Agent must register the judgment.[1] After registration, which is effected by copying the certificate and note of presentation into the register, these are returned, with an attestation indorsed in the form prescribed to the effect that they have been duly registered, and signed by the Sheriff-Clerk.[2] The registered certificate is a sufficient warrant to any Officer of Court to charge the debtor to make payment of the whole sums recoverable under the judgment, and the costs of obtaining and registering such judgment, within fifteen days after the date of such charge, and to use any further diligence that may be competent.[3] The mode in which a charge is to be given if, as will generally be the case, the debtor is outwith the jurisdiction, is not provided for by the Statute, and the provisions of sections 10 and 15 of the Act of 1907 do not seem to apply. If the debtor be in Scotland he must apparently be served in the usual way, and if furth of Scotland he must be served edictally, a registered letter being always sent to his known residence or place of business, if he be in England or Ireland, as in the case of an edictal citation. After the expiry of the fifteen days, without payment having been made, the creditor is empowered to use such further diligence as may be competent. Such diligence is unfortunately limited to poinding such effects of the debtor as may be found within the district of the registering Court, since authority to do execution against goods and

[1] A. S. 7th March 1883, s. 1.
[2] *Ibid.*, Sch. A.
[3] *Ibid.*, s. 2.

chattels, which is all that the Act contemplates, will not in Scotland warrant even the seizure of documents of debt or money; as the districts attached to the local Scots Courts are small in comparison with those attached to the English County Courts, the territory within which the warrant is available is correspondingly smaller. Under the provisions of the Act, it would appear that if a debtor possessed four articles, each lying within one of four districts into which a Sheriffdom might happen to be divided, not only would it be necessary for the creditor to obtain four certificates, procure four registrations, give four charges for payment, and execute four poindings before he could appropriate them, but he would have to take these various sets of proceedings successively and not simultaneously, a concatenation of circumstances which has led to the somewhat caustic, though none the less true, observation that "it is conceivable that means might be devised for taking the effects lying in one Sheriffdom with more expedition and with less expense."[1] The execution is subject to the control and jurisdiction of the Scots Courts in the same way as if it were a proceeding under a Scots judgment; and on proof of recall or satisfaction of the judgment a registration may be cancelled.[2]

[1] Dove Wilson, p. 360.

[2] Inf. Courts Judg. Ext. Act, 1882 ss. 6, 7.

# CHAPTER XXV

## SUMMARY PROCEDURE

### I. Summary Actions


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### I. Summary Actions

**Generally.**—The Debts Recovery Court, abolished by the Act of 1907, was an extension of the jurisdiction of the Small Debt Court to amounts not exceeding £50, accompanied by restrictions as to the kind of debt which might be sued for, and by additional requirements in regard to the forms of process. Generally, the debts that might be sued for under the Debts Recovery Act were such as might be described as falling under the triennial prescription or limitation, or such as would have fallen under that prescription but for the fact that they were constituted by written obligation. The jurisdiction thus conferred, though tolerably extensive, left some remarkable omissions. Thus actions of damages and of aliment were incompetent, though perhaps to no class of action is a summary and inexpensive remedy more appropriate. Actions on bills of exchange, guarantees, and other mercantile obligations were equally incompetent, though if a claim for a debt constituted by them fell within one of

the permitted categories, it might, if expressly set forth, be competent. The sum sued for in the Debts Recovery Court, exclusive of expenses and the dues of extract, required to exceed the value of £12 and not exceed the value of £50, and counter claims required to be of the same nature and between the same limits of value as the claims themselves.[1] Practical experience of the working of the Act, however, showed that, while it was designed to provide a cheap and expeditious method of recovering debts the value of which was above the limit of the Small Debt Jurisdiction and under that to which ordinary procedure was appropriate, the Act failed to justify its existence, the chief objections to its operation consisting in the fact that the cases to which it extended were unnecessarily limited, that its operation, especially in the larger centres, had not tended to expedition, and that the fees recoverable under it, having regard to the time and trouble necessarily involved, were wholly inadequate. The Act of 1907, therefore, while abolishing the Debts Recovery Court, aims at providing an efficient substitute, by providing that all claims concluding for payment of sums in excess of £20 and under £50 in value shall be instituted in the Ordinary Court, the subsequent procedure being, however, so altered and modified as to make the subsequent stages of the cause expeditious and inexpensive in reality as well as in name. Under the provisions of the Act, therefore, all claims which fall within the pecuniary limits are instituted in precisely the same way as other actions in the Ordinary Court, though after initiation they are differentiated from actions raised in the ordinary way by the procedure which is subsequently adopted with reference to them. The restriction to the kind of action which may be treated summarily, formerly imposed by the Debts Recovery Act, does not, however, now apply, all actions or claims of whatever kind, provided only they fall within the prescribed pecuniary limit, being competent. And, as will be seen, any action, even if it exceed the pecuniary limit, may be treated as a summary cause if the parties so agree.

**The Actions Competent as "Summary."**—(1) All actions for payment of money exceeding £20, and not exceeding £50, exclusive of interest and expenses, *except* (*a*) applications under the Workmen's Compensation Act, and (*b*) actions with conclusions *ad factum præstandum*, are "Summary" causes.[2] Actions below the value of

[1] *See* M'Kendrik *v.* Robertson, 1870, 9 M. 283.

[2] Act, s. 3 (i).

£20 must be instituted in the Small Debt Court, while those above £50, except in the case of both parties agreeing to treat such actions as summary, must be dealt with in the Ordinary Court. No difficulty will arise with regard to the first of the excepted classes of actions, but the determination of what actions are necessarily to be included in the second class may occasion some difficulty. There does not appear to be any warrant in the words of the section for assuming that only such actions as contain no other than conclusions *ad facta præstanda* are to fall within the exception, and it would appear that any action which contains such a conclusion either by itself or alternatively along with others, must be regarded as excluded from the operation of the section. It would therefore appear that all actions in which conclusions *ad facta præstanda* exist alternatively with those for payment, as, *e.g.*, in sequestrations for rent, are excluded from the category of summary causes.[1] (2) Actions of whatever kind, notwithstanding that the value exceeds £50, in which the parties consent to the action being treated as a summary cause, *except* (*a*) applications under the Workmen's Compensation Act, and (*b*) actions under the Small Debt Acts, are included within the category of summary causes.[2] The provisions of this section of the Act must be read along with those contained in Rule 40, which would appear to impose a limitation upon the apparently unrestricted power of parties to consent to treat a cause as summary. That rule provides that when any defended cause (other than a claim under the Workmen's Compensation Act) has been tabled, the Sheriff, of consent of parties, may at any stage direct that it be tried as a summary cause, and his decision as to this is final. Under the provisions of the rule, the Sheriff would appear not only to possess a discretionary power either to admit or refuse a cause the privileges of being treated summarily, whether the parties are in agreement as to the matter or not, but to be the final arbiter on the question. The meaning of the section and of the rule when read together would appear to be that, before the cause actually appears in Court or is tabled, the parties may agree that once the action is tabled its progress shall thereafter be according to summary forms of procedure, and that once the parties have so

[1] *See observations in* Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147.

[2] Act, s. 3 (i) (2).

decided no discretionary power to treat the cause otherwise remains to the Sheriff. If, however, the action is actually tabled before any agreement between the parties to treat it summarily has been arrived at, such agreement, or at least the consequences attendant on such agreement, can only validly take place provided the Sheriff is satisfied that, in the circumstances, it is proper. If such a construction of the provisions of the Act is sound, it would seem to be proper if not necessary, in the event of the parties, prior to the tabling of the cause, being in agreement to have it tried summarily, to indorse a minute to that effect upon the initial writ signed by them or their agents. It must, however, be admitted that, apart from the limitation which it apparently imposes on the otherwise wide discretion allowed by the section to the parties to have the issue in controversy between than determined in the manner which seems to them most advantageous and expeditious, as to which no one can probably be in a better position than they are to judge, the phraseology of the rule is somewhat unfortunate, since it provides not that the parties may move the Sheriff to try the cause summarily, but that the Sheriff may, apparently *ex proprio motu*, direct that it shall be so tried, provided that first of all he obtains the consent of both parties to that mode of procedure. It consists, however, with practically universal experience that a defender is rarely desirous of expediting the progress of a cause, and that the forms of process are constantly used to frustrate that object. The aim both of the section and of the rule obviously is to make provision for certain kinds of cases being tried with the utmost expedition compatible with justice and at a minimum of expense, and as a corollary to obviate the practice of dilatory tactics to the progress of the cause on the part of both or either of the litigants concerned. If then it be necessary that the consent of *both* parties shall be obtained before a cause, which in the opinion of the Sheriff is one which is appropriate for summary procedure, can be so dealt with, it would appear that in practice the provisions of the Act will in the majority of cases be rendered nugatory. The spirit of the Act would, it may be thought, have more effectually been carried out had the rule provided that either on the motion or with the consent of the pursuer, and after hearing any objections which the defender might desire to offer, or simply *ex proprio motu* if he considered it expedient, the Sheriff might direct that the action, even if it exceeded the pecuniary limit,

should be tried summarily. Under the provisions of section 23 of the Act of 1853, where the parties lodged in process a minute to the effect that they had agreed to have the cause tried summarily, the Sheriff had no discretion, provided its value exceeded £12, to refuse to allow the cause to be so tried. But while under that provision the Sheriff had no power, as he appears to have under the Act of 1907, to refuse to give effect to the agreement of the parties, experience has proved that the difficulty of obtaining the consent of both parties to treat a cause summarily has resulted in rendering the provision of little or no practical utility. No doubt, as will be seen, the provision of the Act of 1907 is in other respects an improvement on that of 1853, since under the latter Act the parties to an action were limited in their choice either to keep the action in the ordinary roll or to consent to its being remitted for summary procedure to the Small Debt roll, a course by which all right of appeal was lost.

A further difficulty appears, however, to arise from the provisions of the Act. As will be seen later, the warrant of citation upon a summary differs materially from that upon an ordinary cause. The warrant upon the former appoints the defender, not to lodge a notice of appearance as in the ordinary cause, but to answer personally within the Court-house or the Sheriff's chambers on a particular day and at a particular hour. If then the parties agree beforehand that a cause which exceeds in value the pecuniary limit of a summary cause shall be tried summarily, and either endorse a minute to that effect upon the initial writ or take such steps as to make the Sheriff-Clerk duly cognisant of their agreement, there seems no reason to doubt that that official may thereafter competently grant the warrant desired and appropriate to summary causes. The warrant having been granted, the Sheriff does not appear to possess any power to veto the agreement which parties have entered into or to remit the cause to the ordinary roll, and the action thereafter, in accordance with the desire of the parties, proceeds according to summary procedure. If, however, parties prior to the granting of the warrant do not agree to treat the cause summarily, the ordinary warrant is thereupon granted and the case is tabled in the usual way. Thereafter, if parties come to the conclusion that the cause is appropriate more for summary than ordinary procedure, either or both may move the Sheriff to that effect, though no provision is, in terms, made by the Rule of the Act. The Act provides that the

Sheriff *may*, after obtaining the consent of both parties, direct that it shall be tried summarily, but unless the words "and his decision as to this shall be final" do not bear the construction which would naturally be placed upon them, the Sheriff may also refuse to so direct. If, then, the Sheriff does so refuse, the result would appear to be that a different result as to the subsequent course of procedure of a cause may follow according as the parties have agreed before or after tabling it. In the one case the agreement must necessarily be given effect to, in the other it may or may not, according to the opinion which the Sheriff holds as to the desirability of granting the cause the benefits of summary procedure, a result which would not appear to be entirely in consonance with the spirit of the Statute.

**Determination of Value of Cause.**—With the exceptions already mentioned, and of those actions exceeding £50 in value which the parties agree to treat as summary, all actions for payment of money within the pecuniary limit prescribed by the statute are summary causes. The Act, however, in a subsequent section [1] provides that the Sheriff before whom a cause depends shall in such way as he thinks expedient inquire into and determine its value for the purposes of the Act, and his determination shall be final as regards the competency of the action on the ground of value, but not otherwise. The meaning of the section is somewhat obscure. As will be seen later, the determination of the value of the cause is of importance chiefly with regard to the right of appeal, but obviously upon the determination of such value will depend whether it is or is not a summary cause. Now the procedure upon a summary cause not only differs from that on an ordinary cause from the moment when the warrant of citation upon it is granted, but upon the determination of its value depends the precise warrant of citation which will be granted. If the precise "value of the cause" be not disclosed when the writ is presented for the granting of a warrant, on what principle is the appropriate warrant to be selected? The Act itself furnishes no directions on the point, and it can hardly be assumed that the intention was to give the Sheriff-Clerk an unlimited discretion as to the warrant, which ought in the circumstances to be granted, or to impose upon him the responsibility of deciding whether the cause is truly summary or not. If the pursuer present the initial writ to the Sheriff-Clerk and demand a warrant appropriate to a summary cause,

[1] Sec. 9.

and there be nothing *ex facie* of the writ which would show that the cause by reason of its value is really not a summary but an ordinary cause, there does not appear to be anything in the terms of the Statute which would warrant the Sheriff-Clerk in refusing to grant the warrant demanded. The action thereupon becomes summary in its subsequent procedure. At any subsequent stage, however, the words of the Act would appear to confer upon the Sheriff the power of deciding whether, in respect of its value, the cause is really summary or not, his determination of this question so far as regards the competency of the action on the ground of value being final. The determination of the value is vital not only with regard to the procedure to be adopted with reference to the cause, but, as will be seen later, in regard to the rights of appeal.

**Procedure in Summary Cause.**—So far as the initial writ is concerned, there is no difference between that used for a summary and for an ordinary cause, both kinds of action being initiated in precisely the same form.

*Where Action is undefended.*—The warrant in a summary cause differs from that granted in the ordinary case in appointing the defender, instead of lodging a note of appearance, to "answer" within the Sheriff Court-house (in a certain room of the building or in chambers, as the case may be) on a certain day at an appointed hour. At the appointed diet the defender or his agent must appear personally, under certification of being held as confessed. If the defender or his agent fail to appear, the pursuer is entitled to decree forthwith, as in an ordinary action in which no appearance is entered. But the mere fact that defender or his agent have failed to appear does not suffice to warrant decree being granted, and in order to obtain decree the pursuer must indorse upon the initial writ a craving to that effect, signed by himself or his agent, whereupon the Sheriff decerns against the defender in terms of the claim or demand as set forth in the initial writ, and for expenses as they may be certified by a note indorsed upon the writ by the Auditor of Court. This craving may be indorsed upon the writ any time after the expiry of the induciæ, and consequently decree may be granted by the Sheriff at any time thereafter, and without the necessity of formally enrolling the cause for the purpose. Unless the pursuer is certiorated that the defender will not by himself or his agent attend at the diet appointed by the warrant, he cannot obviously obtain

decree at that diet unless he is content to take decree without expenses, since he will not have been able by that time to obtain the note of the expenses indorsed by the Auditor upon the writ. So soon, however, as that note has been indorsed upon the writ, it may be presented to the Sheriff informally, and decree obtained forthwith.[1] If for any reason the pursuer does not desire to take decree forthwith, it may be open to doubt what is the appropriate procedure in the circumstances. The statute does not appear to make any definite provision for such a contingency, though in practice it is one which is not infrequently likely to arise. While it is true that if the defender by his failure to appear confesses that he has no defence to offer to the claim advanced against him, and that therefore there is no reason in equity or justice why the pursuer should not be entitled forthwith to a judgment in his favour, there is no reason why the pursuer should be forced to take decree forthwith whether he desires to do so or not. It would appear that the appropriate procedure in such a case would be for the Sheriff-Clerk to indorse upon the writ a note to the effect that the defender has failed to appear in terms of the warrant of citation, and that the pursuer should thereupon crave a continuation of the cause for such time as he desires. On the expiry of the period for which such continuation is granted, the pursuer may then either obtain decree by a written craving to that effect indorsed upon the writ, or crave a further continuation. The pursuer before taking decree may restrict the amount by a minute indorsed upon the writ itself or set forth in a separate paper, signed by himself or his agent.[2] The Sheriff may also allow the pursuer or his agent to amend any error or defect in the initial writ, and he may further, if he see fit, order the amended writ to be served of new upon the defender, and allow him to appear within such time thereafter as he may think proper, all in the same way and under the same conditions as apply to similar procedure in an ordinary cause.

*Reponing.* At any time before implement of a decree obtained in absence (that is, in summary causes, where the defender has failed to appear by himself or his agent at the diet appointed by the warrant of citation, which in a summary cause is the equivalent to the entering of appearance in an ordinary cause), the defender may apply to be reponed, as against a decree in absence, the procedure to be adopted, the conditions upon which such reponing note is competent, and

[1] *See also* Rule 83.

[2] Act, Rule 23.

the results which follow upon a recall of the decree being the same as those with reference to similar procedure in an ordinary cause.

*Where the Action is defended* the Sheriff possesses a practically absolute discretion as to the procedure which shall follow.[1] Thus he may (1) order a condescendence and defences to be lodged, presumably within such time and according to such conditions, restrictions, or limitations as he thinks proper; (2) make a note upon the writ or separately of the pleas of parties, and appoint a diet for the trial of the cause, the procedure in such a case being practically the same as that formerly adopted in the defunct Debts Recovery Court; or (3) order such other procedure as the circumstances seem to him to require, a provision which gives the Sheriff the widest possible latitude in the selection of the procedure which seems to him the best for all parties and for the determination of the question in controversy between them.[2] Whatever method for the disposal of the cause is adopted, the Sheriff must dispose of it without delay. If a proof be allowed, the evidence is not recorded, unless, upon the motion of either party, the Sheriff so orders, and the interlocutor disposing of the cause must contain separate findings in fact and in law.[3] The rights of the parties to appeal differ according as the evidence has or has not been recorded.

**Appeal.**—(1) *To Sheriff.*—Where the evidence has been recorded, the judgment of the Sheriff-Substitute both upon fact and in law may be brought under review of the Sheriff, but where the evidence has not been recorded the findings in law only are subject to such review,[3] the procedure to be followed being presumably the same as that applicable to appeals in ordinary causes.

(2) *From Sheriff to Court of Session.*—If the Sheriff on appeal is satisfied that important questions of law are involved, he must state them (and presumably the fact that they are in his opinion important) in his interlocutor disposing of the appeal. In that interlocutor, or within seven days from its date, he may grant leave to appeal to a Division of the Court of Session on such questions of law; otherwise his interlocutor in final. It is, it must be confessed, somewhat difficult to see how those provisions can effectually be carried out in practice. If the words of the section are to be interpreted literally, it would appear that it is left in all cases to the

[1] Act, sec. 8; Rule 41.

[2] Act, Rule 41.

[3] Act, s. 8.

determination of the Sheriff, exercised not by motion of the parties but *ex proprio motu*, to state or to refrain from stating whether a question of law is or is not in his opinion important. Upon his decision on this question, formally expressed in his interlocutor, will depend whether the parties can competently appeal against his decision to the Court of Session or not. Apparently, where leave to appeal requires to be obtained from the Sheriff, the application must be made within such time as to enable the Sheriff to grant the required leave, not later than seven days from the date of the interlocutor disposing of the appeal. It will be noticed that in the first place appeal is competent from the Sheriff-Substitute only to the Sheriff, and not under any circumstances to the Court of Session, even where in the opinion of the Sheriff-Substitute important questions of law are raised in a case before him; and, in the second place, that even such limited right of appeal to the Sheriff is competent only where the case has been decided after proof. If the case has been decided without proof, as for instance in a case involving questions of pure law unmixed with fact, in those where the parties are agreed as to the facts, and therefore elect to dispense with probation, or in those where facts are decided without recourse to proof, as where questions of fact are left to the determination of experts or persons of skill, there appears to be no competent appeal of any kind from the judgment of the Sheriff-Substitute. If, therefore, in the opinion of the Sheriff-Substitute the case is one which is appropriate for some form of procedure other than that of proof, the adoption of such form of procedure is tantamount to depriving the parties of all right of appeal from his judgment. It is, it must be confessed, not easy to comprehend the reason for excluding from appeal judgments of the Sheriff-Substitute on questions of law or of fact determined otherwise than by a proof, while admitting to appeal questions decided after evidence has been adduced; or for excluding from the review of the Supreme Court, save on the intervention of the Sheriff, cases in which, in the opinion of the Sheriff-Substitute, important questions of law are involved. In order to leave open the right of appeal on questions of fact as well as of law, parties will not infrequently in practice, it may be anticipated, move the Sheriff to allow the evidence to be recorded in cases in which, but for the statutory provisions, an appeal on questions of fact as well as law would otherwise be competent; and although the Sheriff is invested with

power to refuse the request and to deal with the matter as seems to him most expedient, the mere fact that his refusal to allow the evidence to be recorded necessarily entails upon the parties the deprivation of all right of appeal from his judgment except upon questions of law, may be expected to sensibly operate in the direction of allowing evidence to be recorded in cases in which, in the opinion of the Sheriff, such procedure is not wholly necessary or expedient.

Further difficulties seem, however, to be created by the phraseology of the section. In cases decided by the Sheriff-Substitute after evidence has been led, but which has not been recorded, there is an appeal to the Sheriff on questions of law, though not of fact, involved in the decision. If then the Sheriff differs from the Sheriff-Substitute in the interpretation of the law relative to the case, there can be no appeal from his judgment if the question of law raised is not important, or rather perhaps if in his opinion it is not important. If it be considered that to refuse a litigant the right to appeal to the Court of Session involves hardship, if not a denial of justice, then it follows that a litigant whose case discloses a point of law which in the opinion of the Sheriff is not important, is denied the remedy which is open to another whose case lies under no such disability, wholly irrespective of the pecuniary value of the question in controversy. To refuse a right of appeal to the Supreme Court in all causes in which the question in controversy involves a pecuniary claim below a certain value would appear to rest on strong considerations of expediency, and to involve no injustice on litigants in general. But to deny a litigant the right of appeal to the Court of Session, not because the value of his cause falls below a certain amount, but because it does not happen to raise an important question of law, seems to differ essentially in principle. Similarly, if evidence has been led, there is an appeal from the judgment of the Sheriff-Substitute to the Sheriff, both on the facts of the case and on the law involved in its decision. But the decision of the Sheriff is final as regards the facts, even when he differs from the Sheriff-Substitute, and there is an appeal to the Court of Session only on the law involved, but always provided in the opinion of the Sheriff it is important. But there is no appeal from the judgment of the Sheriff on the facts. If then the Sheriff differs from the Sheriff-Substitute with regard to the facts, he may be expected to differ from him in the law applicable to these facts. But as the Sheriff is the final

judge on the question of fact, the Supreme Court would appear necessarily to be obliged to assume the facts as he decides them, with the result that the case may ultimately be decided on facts which differ entirely or materially from those decided by the judge who actually heard the evidence given, and may have formed his opinions from personal observation of the witnesses and of their demeanour and general trustworthiness. In any event, even though it be conceded that the judgment of the Sheriff on a point of law is more likely to commend itself to the Supreme Court than that of the Sheriff-Substitute, there does not appear to be any conclusive reason for supposing that the Sheriff's judgment on a question of fact is likely to be superior to that of the Sheriff-Substitute.

The Act provides with regard to appeal to the Court of Session, that if in his opinion important questions of law are involved the Sheriff must "state" them in his interlocutor, and that he may "then," or within seven days from the date of his interlocutor, grant leave to appeal. What precise point of time is meant by the word "then" is not clear, but presumably it refers to the date of the interlocutor. The phraseology of the clause is somewhat obscure. If the cause raises important questions of law, is it sufficient that the Sheriff shall simply "state" them as legal propositions without reference to their importance or otherwise, or is it necessary in order to comply with the requirements of the section that he shall not only "state" them, but declare that in his opinion they are important? If, again, in his interlocutor the Sheriff declares certain questions of law raised in the case to be important, must he then or within seven days thereafter grant leave to appeal, or is he entitled, notwithstanding the importance of the questions of law decided by him, to refuse such leave? The phraseology of the section would seem to imply that he has a discretion to refuse leave to appeal, just as he has to refuse to certify a question of law to be important; but the spirit of the Act, on the contrary, would appear to make it imperative for him to grant leave to appeal, either *ex proprio motu* or on the motion of the unsuccessful party, if in "stating" the question of law he certifies it to be important. But if he merely "state" an important question of law without certifying that in his opinion it is important, and without in that interlocutor granting leave to appeal, can the unsuccessful party make a motion to the effect that as the question of law "stated" is important, leave to appeal should be subsequently granted

within the seven days? In other words, if the Sheriff in his interlocutor omits to state that a question of law decided by him is important, has he the power to review his own judgment to the effect of pronouncing that question to be important by subsequent interlocutor? Or can he grant leave to appeal because, although he has not expressly said so, the actual question of law decided by him is essentially and really important? The Act does not appear to throw any light upon these difficulties, and the exact interpretation of the meaning of the clause must be left to judicial decision.

The Act does not in any way provide for the procedure to be adopted in the event of the Sheriff granting leave to appeal, either in the interlocutor deciding the merits of the cause, or in a subsequent interlocutor issued within seven days of his decision. Presumably, therefore, the procedure provided by rule 92 for appeals to the Court of Session from final judgments of the Sheriff in ordinary causes applies, and the appeal must therefore be marked within three months from its date, if the judgment appealed against be not sooner extracted or implemented.[1] As extract of the judgment may, however, be issued after the lapse of seven days from its date,[2] it would perhaps appear that the Statute contemplates that appeal shall be competent within seven days only, and not within the three months applicable to ordinary causes. The fact, however, that in ordinary causes appeal is competent within the three months, while extract may be issued on the expiry of fourteen days from the date of the judgment, would appear to militate against such a construction. In any event the appeal should be marked within the seven days, to prevent its being precluded by the issuing of the extract.

**Incidental Procedure.**—The procedure under the Statute is a modification and extension of that formerly competent in the Debts Recovery Court, and the Act proceeds on the assumption which underlay the provisions of the former Act that all disputed cases under it will involve matters of fact. The Act, therefore, like its predecessor, makes no express provision for causes being disposed of on the relevancy. If, however, a plainly incompetent or irrelevant cause were brought, there seems no reason to doubt that the Sheriff possesses the right to exercise his common-law power of dismissing the summons, or of assoilzieing from the action as laid, or allowing the action to be abandoned on payment of expenses. Similarly,

[1] Act, Rule 92. [2] Act, Rule 85.

although there is no express provision or power which would enable the Sheriff to give judgment simply on the admissions made by the defender, or of the pursuer in a counter-claim, such power may probably be held to be implied. Again, although the power of amending the initial writ or the pleas of the parties is not expressly conferred, little doubt can exist that, as such power is essential for the administration of justice, it is possessed and may be exercised by the Sheriff in virtue of his common-law power.[1]

## II. Summary Applications

Summary applications, which have from time immemorial been a feature of Sheriff-Court procedure, must not be confounded with summary causes, which are a creation of the Act of 1907. Summary applications include—

(1) All applications of a summary nature brought under the common law jurisdiction of the Sheriff;

(2) All applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the Sheriff Court, which allows of their disposal in a "summary manner," but which does not more particularly define in what form they are to be heard, tried, and determined;

(3) All applications which are directed by any Act of Parliament to be heard, tried, and determined "summarily," or in the manner provided by section 52 of the Sheriff Courts Act of 1876, which direction is to be read and construed as if it referred to section 50 of the Act of 1907.

Many Statutes, as for example the Education Act of 1872, the Conveyancing Act of 1874, and the Roads and Bridges Act of 1878, make provision that sums of money due, or disputes arising under them, may be awarded and determined, as the case may be, by the Sheriff in a "summary manner," but which give little or no indication of the meaning to be attached to the phrase. Under these and similar statutes, difficulties were formerly experienced as to whether there should be written pleadings, written proofs, and appeals from the Sheriff-Substitute to the Sheriff. Section 52 of the Act of 1876 provided that in every case of an application, whether by appeal or petition, made to the Sheriff under any Act of Parliament which

[1] *See* Dove Wilson, pp. 531, 532.

provides for, or according to any practice in the Sheriff Court which allows, their disposal in a summary manner in the Sheriff Court without record of the defence or evidence, and without the judgment being subject to review, but which does not more particularly provide in what form they shall be heard, tried, and determined, the application should be, as nearly as might be, in the form and according to the procedure provided by the Act. If, however, the particular Statute under which an application was brought failed, as in the majority of cases it did, to provide that there should be no record of the evidence or of the defence, and no review of the judgment, the provisions of the Act of 1876 failed to apply or to afford any help. By the provisions of the Act of 1907 these difficulties have now been finally removed.

"The Statutes are now numerous in which a new jurisdiction and duty are conferred and laid upon the Sheriff for the purposes of the Statute different from his jurisdiction as Judge Ordinary. The procedure prescribed in these Statutes varies very much in detail, and each must be interpreted by its own terms, the Act of 1907 providing that any exclusion or allowance of appeal competent under any Act of Parliament in force remains unaffected by its provisions.[1] Where there is room for holding that "Sheriff" means the Sheriff Court with its ordinary procedure, then an appeal from the Sheriff-Substitute to the Sheriff will remain, and any different intention must be clearly and unmistakably expressed. In a case in which the language of the Rivers Pollution Prevention Act made it clear that the ordinary procedure of the Sheriff Court was to be followed, the subject-matter of the petition to the Sheriff being similar to that in an ordinary Sheriff Court action, it was held that as no new form had been provided by the Statute, the action must proceed according to the ordinary form in use in the Sheriff Court, with a right of appeal from the Sheriff-Substitute to the Sheriff.[2] There is, however, a series of Statutes which differ from each other in detail, some, though not all, imposing upon the Sheriff a duty which is ministerial rather than judicial, but agreeing in this, that the purpose of the Statute is to be worked out under a procedure marked by more speedy finality and greater dispatch than an ordinary litigation would afford. One feature common to such Acts is that

[1] Act, s. 28.

[2] Mags. of Portobello *v.* Mags. of Edinburgh, 1882, 10 R. 130.

they provide for a single decision in the Sheriff Court, which in some cases is final, while in others there is a single limited appeal. In some Statutes, especially of late years, that object is attained by limiting the jurisdiction to the Sheriff, as distinguished from the Sheriff-Substitute. But a single decision by the Sheriff-Substitute may be contemplated without such limitation. In an early case of that kind, arising under the Bankruptcy Act, Lord Gillies observed that "Sheriff in the Statute means either Substitute or Principal, but not both."[1] In a subsequent case under the Burial Grounds Act of 1855, it was stated by the Sheriff-Substitute, and assumed throughout, that there was no appeal from him to the Sheriff; and it appears from the report that a year or two previously another application had been made under the Act, and that the Sheriff had dismissed the appeal to him from the Sheriff-Substitute as incompetent.[2] The same point has been raised in other cases,[3] in which it has been held that the Sheriff may take up the case though the application has been presented to the Sheriff-Substitute, and he has dealt with preliminary pleas, and that even when the Sheriff had done so under the mistaken impression that an appeal to him was competent. He can intervene so long as no final decision has been pronounced. But all these cases agree in this, that one and only one final decision in the Sheriff Court is competent. A recent case,[4] under section 57 of the Roads and Bridges Act of 1878, decided by the First Division, affirmed this principle."[5]

**Procedure in Summary Applications.**—As the word "action" includes every civil proceeding competent in the ordinary Sheriff Court, summary applications are instituted in the form of initial writ provided for ordinary actions. If citation of the defender is necessary, the Sheriff grants warrant to cite the defender to appear at a fixed time and place, as in a summary cause.[6] The Act further provides that if a hearing is necessary, the Sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or

[1] Balderston *v.* Richardson, 1841, 3 D. 597.

[2] Fulton *v.* Dunlop, 1862, 24 D. 1027.

[3] Fleming *v.* Dickson, 1862, 1 M. 188; Leitch *v.* Scot. Legal Burial Socy., 1870, 9 M. 40; Bone *v.* Sorn Sch. Board, 1886, 13 R. 768; Roxburgh County Council *v.* Dalrymple's Trs., 1894, 21 R. 1063.

[4] *Not reported*; Aberdeen District Council *v.* Milne, 1901.

[5] *Per* Sheriff Crawford, *approved in* Strichen Parish Council *v.* Goodwillie, 1908, S.C. 835.

[6] Act, Rules 1, 4 (*a*).

a subsequent diet, without any record of the evidence unless he orders otherwise, he shall dispose of the matter summarily, and give his judgment in writing.[1] As citation of the defender appears to be unnecessary except in such cases as those in which a hearing is also necessary, presumably the time and place appointed in the warrant of citation, in terms of the provision of the former rule, are those which are meant to be appointed by the Sheriff in terms of section 50. The word "hearing" in section 50, which usually and properly applies to the debate on the evidence, appears rather to apply to a diet at which parties or their agents may competently lead proof on the question in controversy, if such proof be necessary. After the proof is led the parties are then "heard" by the Sheriff, who gives his judgment at the conclusion of the hearing. As the Act prescribes that the judgment must be in writing, it is evidently intended either that the Sheriff shall give his judgment *viva voce* at the termination of the hearing, afterwards without delay reducing it to writing, or that he shall take the matter to avizandum, and give his judgment with the least possible delay, the latter course being that which, in accordance with practice, is the more probable intention of the clause. In practice, however, the question of the subsequent procedure to be adopted is usually the only one discussed at the diet appointed by the warrant of citation, the actual hearing or proof being fixed for a subsequent diet. This practice, though not enjoined, is clearly sanctioned by section 50 of the Act.

**Appeal.**—Many summary applications are applications at common law to the Sheriff as Judge Ordinary of the bounds, though the great majority are presented in virtue of the provisions of specific Statutes. There is no right of appeal in a summary application as such, such right being competent only in the terms of, and under the conditions and limitations imposed by, the specific Statute under which the application is brought. The Act, by providing that nothing contained in it shall affect any right of appeal provided by any Act of Parliament under which a summary application is brought,[1] conserves all such statutory rights, while at the same time it prescribes a uniform code of procedure for the disposal of all applications of a summary nature, whether presented to the Sheriff at common law or by virtue of the provisions of a specific Act of Parliament.

[1] Act, sec. 50.

# CHAPTER XXVI

## CIVIL JURY TRIAL


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### Introductory

The Act of 1907, for the first time in the history of the Sheriff Court, introduces the system of Jury Trial as a process for the determination of civil rights and the redress of civil wrongs. Litigants have for long been conversant with the system of jury trial in the Court of Session. The trial by jury now introduced into the Sheriff Court differs, however, almost radically from that competent in the Court of Session, both with regard to the kind of action which may be so tried and to the procedure adopted both before and during the progress of the trial. Cases originating in the Sheriff Court (other than actions by employees against their employers laid under the Employers' Liability Act, 1880, or alternatively at common law and under that Act), where the claim is in amount over

the value of £50 and an order for proof has been pronounced, may still, under the provisions of the Act, be removed to the Court of Session for jury trial. But section 14 of the Workmen's Compensation Act of 1906 abolished the right of appeal to the Court of Session for jury trial in all cases brought under the Employers' Liability Act of 1880, or alternatively under that Act or at common law, to which by virtue of the provisions of the Judicature Act of 1825 they were previously entitled. The provisions of the Act of 1907 are designed to provide an efficient substitute for the right of trial by jury, of which such actions are thus deprived. But it does not attempt to go further in the introduction of the system of jury trial in civil causes in the Sheriff Court, than to provide such a mode of procedure for the trial of the particular class of actions from which it was taken away by the Act of 1906. The kind of action which may thus be competently tried by jury in the Sheriff Court is therefore strictly limited, and, as will be seen, though the term jury trial is still retained, the actual process thus instituted is essentially a proof before the Sheriff for the determination of the specific facts disclosed, in which he is assisted by a body of seven laymen, rather than a jury trial in the ordinarily accepted sense.

**Actions Competent.**—Jury trial in the Sheriff Court is competent only in actions of damages by an employee against his employer under the Employers' Liability Act of 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds £50.[1] Cases where damages are claimed at common law only by employees against their employers in respect of injuries sustained by accident in the course of their employment, cannot therefore be competently tried by jury in the Sheriff Court, though they may be removed to the Court of Session for jury trial if the claim exceed £50 in value and an order allowing proof has been pronounced.[2] The Court may, however, if it thinks the case so removed unsuitable for jury trial, remit the case back to the Sheriff or to a Lord Ordinary, or send it for proof before a Judge of the Division before which it depends.[2] As will be seen later,[3] actions for injury by workmen against their employers in respect of

[1] Act, s. 31.
[2] Act, s. 30.
[3] *See infra*, Special Actions, Employers and Workmen.

injuries by accident arising out of and in the course of their employment, brought under the Employers' Liability Act of 1880, or alternatively at common law, can be raised in the Sheriff Court alone, and by reason of the provisions of section 31 of the Act of 1907 they cannot be removed from the Sheriff Court to the Court of Session for jury trial. They may, however, be carried through in the Sheriff Court without recourse to jury trial by a proof in the ordinary way, with the ordinary right of appeal to the Sheriff or the Court of Session. If, as has been seen, the claim exceeds £50, they made be tried by jury in the Sheriff Court; if, on the other hand, the claim does not exceed £50, they must be tried by proof in the ordinary way in the Sheriff Court, and they cannot be removed to the Court of Session for jury trial. But all actions (except applications under the Workmen's Compensation Act of 1906 and those with conclusions *ad factum præstandum*), including actions by employees against their employers for reparation for injuries caused by accident, brought either at common law or under the Employers' Liability Act of 1880, or alternatively under that Act or at common law, concluding for payment of money exceeding £20 and not exceeding £50, exclusive of interest and expenses, are summary causes, and must therefore be raised in the Sheriff Court and carried through in accordance with the provisions of the Act regulating procedure in summary causes.[1]

## I. Procedure previous to Trial

**Motion for Jury Trial.**—Either party in an action which may competently be tried by jury, so soon as proof has been allowed, or within six days thereafter, may require that the cause be tried by jury.[2] The words of the statute do not leave the Sheriff any discretion, since either party may "require" that the cause shall be tried by jury. But, as has been seen, to entitle the action to be tried by a jury the claim must be in respect of injury caused by accident "arising out of and in the course of the workman's employment," and if the accident in respect of which damages are claimed does not truly "arise out of" or has not been really occasioned "in the course of the pursuer's employment," then the claim is one which, on a strict interpretation of the terms of the Statute, cannot com-

[1] Act, s. 3 (i). [2] Act, s. 31.

petently be tried by a jury. It must be admitted, however, that the phraseology of the section is such as to render its meaning the reverse of clear. It consists with universal experience that in claims for injuries to workmen, the determination of the questions as to whether the accident in respect of which the claim arises really "arose out of" or was occasioned "in the course of" the workman's employment, is the crux of the whole case. If in an action by a workman against his employee it be conceded at the outset that the injury as a matter of fact did really "arise out of" and was occasioned "in the course of" his employment, there would appear to be nothing left for the determination of the Sheriff on the law, and little for the jury as regards the facts. It may therefore be assumed, without much hesitation, that the section does not mean to imply that when an action by an employee against his employer is remitted by the Sheriff for trial before a jury, that the questions as to whether the injury arose out of or was occasioned in the course of the workman's employment are foreclosed, but only, it would appear, that if the averment of the pursuer is that the injury did arise "out of and in the course of" his employment, he or the defender are entitled to require that the case shall be laid before a jury. That this is the meaning of the section appears clear from the subsequent provisions of the Act. The motion for jury trial must be made at the diet when proof is allowed, or within six days thereafter; if no Court be held within the six days, it must apparently be made by minute or written motion. On the motion being made the Sheriff thereupon appoints the cause, presumably by interlocutor, to be tried before a jury of seven persons.[1]

**Statement of Questions for Jury.**—The Sheriff, if he deems it necessary or desirable, may then hear the parties, and either with or without such hearing he must issue an interlocutor setting forth the question or questions of fact to be proponed to the jury at the trial, at the same time fixing a time and place for the trial, which must take place not sooner than fourteen days from the date of the interlocutor. Though the Statute does not say so, the "hearing" of the parties presumably has reference to the question or questions which are to be proponed to the jury, and therefore would appear to be a substitute for or equivalent of the adjustment of issues in a trial by jury in the Court of Session. The provision of the

[1] Act, sec. 31.

section appears to lay upon the Sheriff the duty and responsibility of framing and setting forth the questions of fact to be laid before the jury, a provision which, if the phraseology of the section be accepted literally, introduces an entirely novel method of laying a case before a jury. In any event, the question or questions of fact must presumably be such as are averred on record and are material and relevant to the determination of the question in controversy between the parties. But the Act gives no directions as to the principles which are to guide the Sheriff in framing the questions, nor to the form in which such questions are to be put. Nor does it provide that subsequent to their adjustment by the Sheriff they are to be submitted to the parties for their approval or suggestion by way of amendment. Is each material fact disclosed in the averments to be a substantive question of fact by itself, as to which the jury are required to return a categorical answer, or is the case to be presented to them in the form of a general query or queries embracing only such fact or facts as the Sheriff may deem relevant and material to the decision of the cause? It will probably in practice be deemed advisable and prudent to adopt, as nearly as the language of the Statute and the circumstances of each individual case permit, broadly and generally the practice of the Court of Session with regard to the adjustment of issues in a jury trial in that Court. If such a course be deemed competent and advisable, then presumably in practice the parties at the hearing (which, except in cases of extreme simplicity, may be expected to become practically universal) will come prepared with a list of the questions which in their judgments respectively are those which the Sheriff ought to state for the guidance of the jury. The Sheriff will then "adjust" the questions, and after adjustment embody his decision in a series of questions to be ultimately proponed to the jury as the questions of fact in the case which they are required to decide. Either party who is dissatisfied may then competently appeal, with leave of the Sheriff-Substitute (which only in very exceptional circumstances will be refused) either to the Sheriff or the Court of Session under Rules 27 (e) or 58 (c) of the Act respectively.

**Lodging Productions.**—Documents or productions intended to be put in evidence or referred to at the trial must be lodged with the Clerk of Court four days before the date fixed for the trial. The Sheriff may, however, allow productions to be exhibited

and produced at the trial if he is satisfied that they could not reasonably have been lodged earlier, and that reasonable notice has been given to the other parties of the intention to produce them at the trial.[1]

**Citation of Jurors.**—The jury consists of seven persons, two being special and five common jurors. They are chosen from a panel of five special and ten common jurors cited for the diet.[2] The jury is cited by the Sheriff-Clerk from the Sheriff Court Jury Book in the manner prescribed by law, or in use to be followed, for the citation of jurors in Scotland,[3] all statutory or other regulations and customs relative to the citation, non-attendance, selection, and swearing of jurors being (subject to the provisions of rule 135 dealing with rights of challenge) applicable to trial by jury in the Sheriff Court.

**Qualifications of Jurors.**—Jurors must be between the ages of twenty-one and sixty, persons below or above these ages respectively being exempt from service as jurors. To entitle a person to act as a common juror, he must be possessed in his own right or in right of his wife of heritable property within the county of the yearly value of £5, or of personal property of the value of £200.[4] As a special juror, he must reside within the Sheriffdom and be possessed of personal property of the value of £1000, or be infeft in heritable property yielding £100 per annum. or pay Crown taxes on a house of the rent of £30 a year, or pay cess in the county upon £100 of valued rent (that is, land tax, now only partially exigible).[5] The following persons, even though possessed of the foregoing qualifications, are exempt from service as jurors: Peers; Judges, Sheriffs, and Magistrates of Royal Burghs; ministers of religion; parochial schoolmasters; solicitors and officers of the law, and clerks and officials of the Court; professors in Universities and physicians and surgeons; officers of the Army and Navy; officials of the Customs, Excise, and Income Tax, and of the Inland

[1] Act, Rule 142.

[2] Act, Rule 133.

[3] Presumably "in civil cases." These words occur in sec. 10 (4) of the Fatal Accidents Inquiry Act of 1895, and in the first part of section 4 of the Fatal Accidents Inquiry Act of 1906, which amended the previous Act, but are omitted in the present Act, though the scheme of Jury Trial is borrowed from that instituted by those Acts.

[4] 6 Geo. IV. c. 22, s. 1; 32 & 33 Vict. c. 36; 34 & 35 Vict. c. 103.

[5] 55 Geo. III. c. 42, s. 24; 7 Geo. c. 8, s. 1.

Revenue generally; lighthouse keepers; dentists; officers and men of the Territorial Forces.[1]

## II. Procedure at Trial

**Payment of Jurors.**—The party moving for jury trial must, each day the trial proceeds, and before the proceedings commence, deposit with the Sheriff-Clerk the sum of three pounds ten shillings, which deposit forms part of the expenses in the cause. Failing any such deposit being made, the Sheriff may dismiss the cause. Out of the money so deposited the Sheriff-Clerk pays each juror the sum of ten shillings for each day on which he is empanelled. If the trial is not proceeded with the money deposited is returned to the depositor.[2]

**Challenge of Jurors.**—Each party in the cause has the right to challenge one special and one common juror, but not more; and in this matter, where there are more pursuers or defenders than one, they must act collectively and not individually.[3] Where, therefore, there are more pursuers or defenders than one, the parties on each side intending to make a challenge must come to an agreement beforehand as to the particular juror who is to be challenged, since there is no individual challenge in the case of a plurality of pursuers or defenders. To enable parties to come to such an agreement it would appear to be necessary, though the Act makes no provision to the effect, that the list of jurors cited should be open to the inspection of the parties a reasonable time before the commencement of the trial.

**Issue laid before Jury.**—Each juror empanelled must, at the commencement of the trial, be supplied by the pursuer with a copy of the questions of fact proponed, as set forth in the Sheriff's interlocutor.[4] The Act does not specifically provide that the jury is to be cognisant of the amount of damages claimed by the pursuer. As they are bound, however, to assess the damages, in the event of their being of opinion that damages ought to be awarded, it would appear to be reasonable, following the practice of the Court of Session, that

[1] 6 Geo. IV. c. 22, s. 2; 32 & 33 Vict. c. 36; 34 & 35 Vict. c. 103, s. 30; Dentists Act, 1878; Territorial and Reserve Forces Act, 1907, s. 23 (4).

[2] Act, sec. 33.

[3] Act, Rule 135.

[4] Act, Rule 136.

a statement of the amount claimed should be appended to the "issue." Otherwise it is conceivable that the jury might award a sum in excess of that actually claimed. Though the word "issue" occurs in the rubric of the section, it must not be taken, it would seem, to mean the exact equivalent of that word in the practice of the Court of Session. It is the "issue" between the parties only in the sense that it contains the questions of fact with reference to which the parties are at issue.

**Leading Evidence.**—The law and practice relating to the taking of evidence in proofs before the Sheriff apply to jury trials.[1] Unless the parties by minute dispense with it, a record of the proceedings is taken by an official shorthand writer of the Court, but the notes need not be extended unless, in the case of an appeal, their production is ordered by the appellate Court, in which event it is the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to lodge them with the principal Clerk of Session. As will be seen, an agreement by the parties to dispense with a record of the proceedings is tantamount to an agreement to dispense with the right of appeal.

*Evidence on Commission.*—When evidence has been taken to lie *in retentis*, if the Sheriff is satisfied that the deponing witness is dead, or that he cannot attend at the trial owing to absence or infirmity or other sufficient cause, it is competent for the Sheriff, on motion of any party in the cause (irrespective of which party moved for the commission to take such evidence) to direct that the report of the commission be read to the jury, and when so read such support shall form part of the evidence in the cause; but depositions shall not be read or referred to if the deponing witness attends at the trial.[3] The section clearly contemplates that the notes of any evidence taken on commission, which like the evidence at the trial is taken by the official shorthand writer of the Court, shall be extended prior to the trial, since either party at the trial may move that such evidence shall be read to the jury. It will presumably be the duty of the party moving for the commission to procure the extended notes certified by the shorthand writer, the expense being, in the first instance, payable by the parties equally.[4]

*Exceptions.* — Exceptions taken in the course of the trial to

[1] Act, Rule 137.
[2] *Ibid.*
[3] Act, Rule 138.
[4] Act, Rule 67.

rulings of the Sheriff in regard to the admission or rejection of evidence, or in regard to points of law laid down in the course of the trial or in the Sheriff's charge to the jury, must, if required by the party taking the exception, be recorded to the Sheriff's dictation upon the official shorthand notes before the jury proceed to their verdict.

**Addressing the Jury.**—After the leading of evidence has been concluded, the parties personally, or by counsel or agent, may address the jury, one speech only on behalf of each interest represented being made. No person, however, is entitled to address the jury until the leading of evidence has been concluded.[1] There are therefore no opening speeches, the questions of fact on which the jury are to return their verdict usurping the place of, and presumably forming an efficient substitute for, the speeches delivered at the beginning of civil jury trials as conducted in the Court of Session. In this respect, as in certain others, the Act adopts the procedure customary in criminal jury trials.

**Charge to Jury.**—If the Sheriff deem it necessary to charge the jury, he must do so immediately after, or as soon as practicable after, the conclusion of the speeches, or if none be made, after the conclusion of the evidence.[2] As the sole function of the jury is to return a verdict on the specific facts placed before them, the question of law arising on the facts being reserved for the decision of the Sheriff, there would appear (notwithstanding the provisions of Rule 141) to be no ground for any direction to the jury other than upon the facts disclosed by the evidence or as to the amount of damages which ought to be awarded, if the jury are of opinion that such an award falls to be made.[3] The Sheriff possesses a discretion to charge the jury or not as he sees fit, and, except in cases where the facts are complicated or the evidence is more than usually conflicting, a charge would appear to be unnecessary.

**The Verdict.**—The jury may return a verdict by a majority of its number at any time not less than one hour after the jury has been enclosed.[4] The verdict is returned in the form of specific answers to the questions proponed by the Sheriff, with the addition of a statement of the amount at which they assess the damages in

[1] Act, Rule 140.
[2] Act, Rule 141.
[3] As to charge on this ground *see infra*, Damages awarded excessive.
[4] Act, Rule 143.

the event of damages being awarded.[1] The verdict returned by the jury is recorded upon the interlocutor sheets and signed by the Clerk of Court, and this having been done the jury is discharged.[2] After the discharge of the jury the verdict as recorded cannot be altered in its terms on the allegation that it does not adequately or really express their meaning.[3] The "verdict" of the jury is not, however, final until it is applied by the Sheriff; more properly speaking, there is no verdict until the Sheriff applies it. The form of verdict therefore which the jury is required to return is that which is known in the Court of Session as a "special verdict," or one upon specific facts. In such a verdict the jury, instead of finding the affirmative or the negative of the issues, returns special findings in fact, and without a general finding in favour of either party, finds alternatively for that party in whose favour the Court shall determine a question of law. The provisions of the section obviously therefore mean that if in the opinion of the jury the answers which they return to the specific questions of fact proponed to them necessarily involve a verdict for the pursuer, they must assess the amount of damages to which, in their opinion, he is reasonably entitled. But the decision of the law applicable to the facts is, by the provisions of the Act, reserved for the Sheriff. The Sheriff may therefore hold that in law the answers to the specific questions proponed necessarily involve a verdict for the defender, even though the jury after answering the questions assess the damages at a certain amount, thereby indicating that in their opinion, as judges of the facts disclosed by the evidence, the pursuer is entitled to a verdict. It would, it may be permissible to observe, have been more in accordance with the spirit of the Act if the section had provided that in the first place the jury should simply and categorically return specific answers to the questions proponed to them, and that upon considering such answers it should be the duty of the Sheriff to direct the jury that in law their answers involved a verdict for the pursuer or defender as the case might be. If, then, in the judgment of the Sheriff as the final arbiter on the question of law, the jury were directed by him that the answers necessarily involved a verdict for the pursuer, the jury might then proceed to determine the amount of damages which in their opinion would reasonably follow from such a verdict. If,

[1] Act, Rule 144.
[2] Act, Rule 145.
[3] Pirie *v.* Cal. Rly. Co., 1890, 17 R. 1157.

however, the jury actually assess the damages when returning their answers to the questions of fact, their assessment inferentially involves the decision which in their opinion should follow from the evidence laid before them, and in such a case a decision by the Sheriff adverse to that of the jury is practically tantamount to constituting him the judge of the facts as well as the law. It may be, as will be seen later, that part of the duty of the Sheriff in charging the jury is to direct them that in the event of their answers to certain questions of fact being affirmative or negative, as the case may be, the verdict will in law necessarily be for the pursuer or the defender accordingly. If such a construction of the spirit of the Act be sound, it would also seem to follow that the jury are thereby constituted the judges of the law applicable to the case as well as the final arbiters on the question of facts, a construction which is certainly at variance with the express provisions of the Statute. Probably, however, what the provisions of the Act mean is, that when answering the questions the jury must indicate what, in the event of their answers being in law construed as a verdict for the pursuer, would be the amount of damages which in their opinion would reasonably follow from such a verdict.

### III. Procedure after Trial

**Applying the Verdict.**—Any party in the cause may, so soon as the verdict has been so recorded, or within fourteen days thereafter, move the Sheriff to apply the verdict, and upon this motion the Sheriff may hear parties and may make avizandum.[1] The phraseology of the section is somewhat misleading, presumably owing to the fact that it has been borrowed from the analogous but totally different procedure applicable to jury trial in the Court of Session. There is, properly speaking, no verdict to apply. In the Court of Session the verdict of the jury is truly a verdict on the whole cause, for the pursuer or the defender as the case may be, both in fact and in law. But in the Sheriff Court there is no verdict properly so called. The sole function of the jury is to return specific answers to certain questions of fact. These answers do not, and cannot in any sense, constitute a verdict in the sense of a specific decision of the question in controversy between the parties. Such answers cannot do more than provide the material

[1] Act, Rule 146.

from which the verdict can be deduced. They may, of course, be such that from their terms a certain judgment must necessarily and logically follow, and in that sense, and that sense only, are they entitled to the name verdict. What the section obviously means is, not that the Sheriff shall apply a verdict which has never been given, but that from a consideration of the answers which the jury have returned to certain questions proponed to them he shall decide what judgment must, on the law applicable to the facts, necessarily and logically follow. The motion to "apply" the verdict must be made within fourteen days from the recording of the verdict of the jury, and if no motion be made within that time the Sheriff has no power to deal with it at all, and the whole case therefore falls. But the actual hearing upon the motion may apparently take place at any time the Sheriff may consider expedient. The Sheriff must, however, as soon as practicable, issue his interlocutor "applying" the verdict, and grant decree accordingly,[1] from which provision it may be deduced that the procedure following upon the trial is to be conducted with reasonable expedition. In his interlocutor applying the verdict, which is the final interlocutor in the cause, the Sheriff must dispose of the question of expenses, presumably in accordance with the ordinary rules governing the awarding of expenses.

### IV. Appeals

In a jury trial in the Court of Session, the only mode by which the verdict can be reviewed is by a motion for a new trial, either with or without a bill of exceptions. There is no other way in which a party can interpose between the returning of a verdict by the jury and its being entered up and applied by the Court. Wherever the complaint of the party against the verdict is directed against the opinion or direction of the presiding Judge, as to competency of evidence or other matter of law arising at the trial, it may be brought in the form of a bill of exceptions, and the judgment of the Court on the exceptions is subject to appeal to the House of Lords. Every other complaint, as well as objection to the directions of the Judge, having for its object the setting aside of the verdict and ordering a new trial, must be in the form of a motion for a new trial, and the judgment of the Court on this

[1] Act, Rule 146.

application is not subject to review by appeal to the House of Lords.[1] In jury trial in the Sheriff Court, there is no such procedure as a motion for a new trial, and as in the case of an ordinary proof the only way in which errors in fact or in law can be corrected is by an appeal to a higher Court for review of the judgment or verdict. In the Sheriff Court there is no intermediate appeal to the Sheriff, and appeal is competent to either Division of the Supreme Court only on certain specific grounds. But there is no appeal unless shorthand notes of the evidence have been taken,[2] and if parties therefore agree beforehand, as they may competently do, that no shorthand notes of the evidence shall be taken, they bar themselves by such a course from all right of appealing either the verdict of the jury on the questions of fact submitted to them, or the interlocutor of the Sheriff applying such verdict. And so far as such right of appeal is concerned, no notes of the evidence taken by the Sheriff or by any one other than the official Court shorthand writer are of any avail. The appeal, which must be taken within fourteen days of the date of the interlocutor applying the verdict, is taken by lodging with the Sheriff-Clerk a note of appeal in the form provided by the Act.[3]

**Grounds of Appeal.**—There are only four specific grounds on which appeal is competent, two of which are connected with the questions of fact proponed to the jury, and two which are connected with the decision of the Sheriff on the points of law involved. It may be convenient in dealing with these grounds of appeal to deal with the former as grounds of appeal on the facts of the case, and with the two latter as grounds of appeal in law. Of the former, the grounds are (*a*) that the verdict is contrary to the evidence, and (*b*) that the award of damages is excessive or inadequate. Of the latter, (*a*) that the verdict has been erroneously applied by the Sheriff, or (*b*) that he has in the course of the trial unduly refused or admitted evidence, or misdirected the jury. There is no appeal against the interlocutor stating the questions of fact for the jury, except by leave of the Sheriff-Substitute at the time the "issue" is adjusted.

1. *Verdict contrary to Evidence.*—As has been seen, the jury in the Sheriff Court do not return a verdict in the sense of a finding

[1] D. of Buccleuch *v.* Cowan, 1866, 5 M. 214, *per* L. J.-C. Inglis.

[2] Act, Rule 147.

[3] Act, Rule 148, Form M.

for the pursuer or defender respectively. What they are required to do is to return specific answers to certain specific questions of fact proponed to them by the Sheriff, such facts being those which in the opinion of the Sheriff are material to the decision of the cause and are relevantly averred upon the record. In the Court of Session the Court deals with the verdict of the jury as a finding in favour of one or other of the parties, and in a motion for a new trial on the ground that such verdict is contrary to or not supported by the evidence, the Court, on a consideration of such evidence, and the value to be attached to the testimony of the various witnesses, decides whether the verdict generally is or is not at variance with any reasonable view which can be taken of its effect as a whole. While it is perhaps difficult to formulate a positive rule, it may be said generally that a verdict of a jury will, in the Court of Session, be set aside as contrary to the evidence if there be no proper or sufficient evidence to support it, or if it be contrary to the evidence in the sense, not that a different view of the effect of such evidence would have been taken by the Court had it been sitting as a jury, but that it is at variance with any reasonable view which can be taken of its effect as a whole. And in determining whether a verdict should be set aside, the Court will attach great weight to the opinion of the Judge who tried the cause, though his opinion is not conclusive. The finding of the jury in the Court of Session is not a finding upon the facts exclusively; it is a finding that upon the facts presented to them, and applying to these facts the law applicable to them as laid down by the Judge in his charge, they are of opinion that the pursuer or the defender, as the case may be, is entitled to prevail. And that finding or verdict will be upheld by the Court, unless in their opinion the jury have gone so extravagantly wrong in the view which they have taken of the import of the evidence as a whole that no reasonable person could support it. The verdict is therefore not a decision of the facts, but a finding of what ought in the jury's opinion to follow as the result of the facts established. In the Sheriff Court, on the other hand, the verdict of the jury is nothing more than an answer or a series of answers to a series of questions, the Sheriff, and not the jury, being the judge as to the proper inference which falls to be drawn from the facts as they are held to be established in the opinion of the jury, in accordance with the answers they have

returned to the questions proponed to them. While generally, therefore, the principles which have guided the Court of Session in granting or refusing a new trial on the ground that the verdict of the jury is or is not contrary to the evidence, seem to apply to appeals from the Sheriff Court, there would appear to be some room for a distinction. The function of the Supreme Court on appeal in jury trial appears to be to determine simply whether or not the jury have answered each or all of the questions proponed to them strictly in accordance with the evidence or not. That the construction of the terms of the Statute suggested would appear to be sound, will perhaps receive confirmation from the phraseology adopted with reference to another ground of appeal to be dealt with later, namely, that which provides that the verdict may be appealed on the ground that it has been misapplied by the Sheriff, a ground of appeal which has no analogue in the practice of the Court of Session.

If on appeal the Court are of opinion that the verdict is contrary to evidence, which, if the construction of the Act suggested be accepted as sound, means that if in their opinion the answer or answers to the questions of fact proponed to the jury have been answered in a way which is directly contrary to or unsupported by the legal evidence adduced, they may set aside the verdict and order a new trial.[1] The section further provides, in accordance with the rule which obtains in the Court of Session on a motion for a new trial without a bill of exceptions, that if the Judges are equally divided in opinion the verdict shall stand. Obviously, in view of the fact that an appeal is specially provided for the case of an erroneous application of the verdict by the Sheriff, the words the "verdict shall stand" do not refer to the actual verdict as it is applied by the interlocutor of the Sheriff, but to the verdict as meaning the answers of the jury on the questions of fact submitted to them.

2. *Damages* (a) *excessive* or (b) *inadequate.*—(a) *Damages excessive.*—As the jury is specially qualified to decide the question of the amount of damage to be awarded, which like the decision of the questions of fact is a matter peculiarly within their province, the Court will not set aside an award on the ground that it is excessive unless it be such as to raise on the part of the Court the moral conviction that the jury, whether from wrong intention or

[1] Act, sec. 31.

incapacity or from some mistake, have committed gross injustice, and have given higher damages than any jury of ordinary men exercising their functions fairly and without gross mistake could have awarded.[1] Thus an award of £3000 was held to be not excessive damages for injury by accident to a draper, producing paralysis of legs and left arm[2]; nor £800 for injury by fall from a tramway car which was likely to result in permanent lameness[3]; nor £400 for the death of a woman earning 12s. 6d. a week[4]; nor £750 for a miner 50 years of age with a family of seven daughters and a son, for injuries caused by a fall of coal which resulted in injuries to his spinal column, permanently incapacitating for work as a miner.[5] On the other hand, £900 has been deemed excessive for the death of a builder with an income of £150.[6] The grounds for disturbing a verdict on account of an excessive award of damages require to be much stronger than those for disturbing a verdict as being contrary to evidence, because in the one case there is, and in the other there is not, what may be called certainty. If a bench of trained Judges come to the conclusion that a verdict is not supported by evidence, it may be taken that, if anything human is right, such a conclusion is. But the assessment of damages for personal injuries is a haphazard operation, in regard to which there is no certainty. The only *ratio*, therefore, on which a verdict on the ground of an excessive award of damages can or ought to be disturbed, is when the Court can say that the jury has come to a verdict to which twelve ordinary reasonable men would not.[7] The direction to the jury which is approved in the Court of Session, and which ought therefore to serve as a model for Judges in Inferior Courts, is that they ought not to attempt to fix damages at the highest amount possible for the injury that the pursuer has suffered, but that they should take a reasonable view of the case, and award what in the circumstances they consider to be fair compensation.[8] Motions for a new trial in the Court of Session on the ground of an excessive award of damages

[1] Landell *v.* Landell, 1841, 3 D. 825, *per* Ld. Fullerton.

[2] Shields *v.* N. B. Rly., 1874, 2 R. 126.

[3] Young *v.* Glasgow Tram. Co., 1882, 10 R. 245, *diss.* Ld. Shand.

[4] M'Master *v.* Cal. Rly. Co., 1885, 13 R. 252.

[5] Casey *v.* United Collieries Co., 1907, S.C. 690; *apprvg.* Landell *v.* Landell, *sup.*

[6] Wallace *v.* West Calder Co-op. Socy., 1888, 15 R. 307.

[7] Casey *v.* United Collieries Co., *sup.*, *per* Ld. Pres. Dunedin.

[8] *Ibid.*, *per* Ld. Kinnear.

are rarely made and still more rarely granted, and it may be doubted if there are more than some half-dozen instances reported of a new trial being granted on this ground since the reintroduction of civil jury trial into Scotland in 1815.

(b) *Damages Inadequate.*—A motion for a new trial on the ground that the jury have failed to award adequate damages is so rare as to be practically unprecedented. Only the most exceptional circumstances, and the conviction that the award is so grossly inadequate as to be tantamount to a complete denial of justice, will induce the Court to grant a new trial on this ground.[1]

3. *Verdict erroneously applied.*—In the Court of Session, the verdict of the jury, which is a verdict in favour of the pursuer or defender, is not final until it is applied by the Court. The motion to apply the verdict is made, not to the Judge who presided at the trial, but to that Division of the Court to which the cause belongs. The issues and verdict are alone considered; but if, though nominally finding for one party, the jury has not in substance affirmed the issue in his favour, or has found a special verdict which does not infer that result, the Court will not apply the verdict in his favour, but in that of the opposite party, or it may order a new trial, or do otherwise as the justice of the case requires.[2] Nor will the Court apply a verdict ambiguous upon a material point, as where in an action for reparation for injury the jury found that there was contributory negligence, yet gave £300 damages.[3]

In the Sheriff Court, however, the verdict of the jury is applied by the Sheriff, and there is no final verdict in the case until the Sheriff issues his interlocutor applying the verdict, the verdict of the jury being an inchoate finding upon the facts to which the law appropriate is applied by the Sheriff. In the Court of Session the jury returns a verdict both upon the facts and the law, taking their direction as to the latter from the presiding Judge. But in the Sheriff Court the Sheriff does not, it would appear as a necessary inference from the provisions of the Act, direct the jury as regards the law, the decision with regard to which is reserved for him. The function of the Sheriff, therefore, would appear to be analogous to

[1] *See* Black *v.* Croall & Son, 1854, 16 D. 431; Reid *v.* Morton, 1902, 4 F. 438.

[2] Mackay's Manual, p. 355.

[3] Florence *v.* Mann, 1890, 18 R. 247; *see* Morgan *v.* Morris, 1858, 3 Macq. 323; M'Whinnie *v.* Johnston, 1864, 2 M. 668.

that of the Court in the Court of Session, in so far as it is his duty to enter up the verdict for that party who, on a consideration of the findings in fact pronounced by the jury, is in his opinion in law entitled to it. The function of the Court similarly would appear to consist in reviewing the decision of the Sheriff, as a decision in law upon the facts decided by the jury. Such a procedure is therefore closely analogous to that applicable to appeal by stated case. In a stated case the Sheriff pronounces certain findings in fact, and then applies the law to the facts as stated. The Sheriff's findings in fact are not subject to the review of the Court, but the Court decides whether on the facts stated the Sheriff has or has not erred in his application of the law. Similarly, in a jury trial the facts as determined by the jury in answer to the questions proponed to them, and if there be no appeal on the ground that the decision of the jury is contrary to the evidence, are the facts on which the Court decides whether the Sheriff has or has not erred in applying the verdict. Of course, if appeal be also taken on the ground that the verdict is contrary to the evidence, the Court will review the evidence and decide whether the jury, as the judges of fact, have erred in their decision. But if no appeal be taken except on the ground that the Sheriff has misapplied the verdict, presumably the Court is bound to accept the verdict of the jury as deciding the facts of the case. The section provides that on an appeal on the ground that the verdict has been erroneously applied by the Sheriff, the Court may refuse the appeal or find that the verdict was erroneously applied, and give judgment accordingly. But no power is conferred upon the Court to set aside the verdict and grant a new trial where the appeal is solely on the ground that the Sheriff has misapplied the verdict, as it has power to do on the remaining three grounds of appeal. The section, however, provides that the Court may sustain the appeal and give judgment accordingly, which would appear to mean that if it is of opinion that the verdict has been misapplied, the Court may apply it in favour of the opposite party.

4. (*a*) *Undue refusal or admittance of Evidence, and* (*b*) *Misdirection to the Jury.*—(*a*) *Undue refusal or admittance of Evidence.*—In the Court of Session, exceptions may be taken to the Judge's ruling in the course of the trial as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial.

Such exceptions when taken are noted by the Judge, and if he so directs, or the party excepting thinks proper, a note of them is written out and signed by such party or his counsel, and also (if it correctly states what was decided) by the Judge at the time. The exception may thereafter be made the ground of an application to set aside the verdict either by motion for a new trial or by bill of exceptions. The bill of exceptions (which may be subsequently prepared) consists of a distinct statement of the exception or exceptions so noted, with such a statement of the circumstances in which the exception or exceptions were taken (including if necessary a statement of the purport of the evidence, or extracts from it, but without any argument) as along with the record in the cause may enable the Court to judge of such exception or exceptions. Unless the party excepting chooses, or the Court at the discussion directs, it is unnecessary to submit to the Court the notes of evidence in the cause. Even when the notes of evidence are produced, they form no part of the bill of exceptions. In discussing the bill of exceptions, it is competent for either party to refer to the record and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time.[1] Review by bill of exception is strictly limited to questions of law. Bills of exceptions are not sustained by the Court upon the ground of undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict from that actually pronounced, nor on the ground of undue rejection of documentary evidence, if it appears from the documents themselves that they ought not to have effected the result at which the jury by their verdict have arrived.[2]

In the Sheriff Court, exceptions taken to the rulings of the Sheriff in regard to admission or rejection of evidence are recorded to the Sheriff's dictation upon the official shorthand notes, provided the party taking the exceptions, requires that to be done.[3] There is therefore nothing in the Sheriff Court procedure analogous to the bill of exception, the procedure with regard to the admission or rejection of evidence being the same as that followed in an ordinary proof. By the admission or rejection of evidence is meant the admission of evidence legally incompetent, and the rejection of evidence

[1] Court of Session Act, 1868, s. 34; A. S. 16th Feb. 1841, s. 32.

[2] 13 & 14 Vict. c. 36, s. 45.

[3] Act, Rule 139.

legally competent. The admission of evidence in replication is in the Court of Session a question within the discretion of the Judge who presides at the trial, and is therefore not a proper subject for exception, and where injustice is done by the admission or refusal of such evidence the remedy in that Court is by motion for a new trial.[1] But in the Court of Session a motion for a new trial may be made on several grounds other than those which apply to Sheriff Court procedure, or simply on the ground that to allow the verdict to stand would be tantamount to a denial or miscarriage of justice.[1] By analogy it would therefore appear that the admission or refusal of evidence in replication by the Sheriff cannot competently be made the subject of an exception, or at least if exception be taken, that it could not be made the ground by the Supreme Court for quashing the verdict and ordering a new trial. To found the exception that evidence has been unduly admitted or rejected by the Sheriff, it must be shown that not only was such evidence improperly admitted or rejected, but also that it was material and available.[2] The Act does not in terms enjoin that appeal on the ground of the undue admission or rejection of evidence is competent only where exception to the admission or rejection of such evidence is taken and noted at the time in terms of Rule 139, but the spirit of the Statute and the analogous procedure in the Court of Session would appear to lend such strong countenance to the view that only in such a case is such appeal competent, that it may be accepted as sound.

(*b*) *Misdirection of the Jury.*—In the Court of Session, exception may be taken to the Judge's charge to the jury on the ground of an erroneous direction in law. The exception must be taken during the course of the trial,[3] and it must be on the law and not on the facts of the case.[4] The misdirection complained of may be an erroneous direction in point of law or an omission to give a necessary direction in point of law. A misdirection on a matter of fact cannot be excepted to, the remedy being to have the fact corrected at the time by a reference to the notes of evidence. The bill of exceptions embodying the exception taken at the trial must explicitly state both the direction complained of and the direction which ought to

[1] Rankine *v.* Roberts, 1873, 1 R. 225, 229, *per* Ld. Pres. Inglis.

[2] Hogg *v.* Campbell, 1865, 3 M. 1022, *per* Ld. Deas.

[3] M'Clelland *v.* Rodger & Co., 1842, 4 D. 646.

[4] Leven *v.* Young & Co., 1828, 1 Mur. 371.

have been given, and if the direction complained of is a general proposition in law, which has been wrongly applied, the bill must show such erroneous application or it will be refused.[1] An exception on the ground of an omission to give a necessary and proper direction requires to be stated with the greatest precision, from the fact that the Judge who presides at the trial must be assumed to have laid down the law applicable to the case, so far as it is not excepted to.[2] Where exception is taken on this ground, the Judge must be asked to state to the jury the special proposition or propositions in law applicable to the particular case, and his refusal may be made the ground of an exception. He cannot, however, be asked to lay down abstract general propositions in law without reference to their application to the case,[3] nor to put to the jury the general question of liability after he has put specific questions which exhaust the case,[4] and he may refuse to give a direction which is not expressed with the clearness and precision that are desirable in a judicial direction to the jury.[5]

Section 31 of the Act of 1907 merely provides that one of the grounds on which an appeal to the Supreme Court may be taken, is that the Sheriff has in the course of the trial misdirected the jury. It seems difficult to construe this provision, which appears to have been borrowed from the procedure of the Court of Session, without adequate consideration as to its applicability to the scheme of jury trial in the Sheriff Court embodied in the Act. As has already been pointed out, the jury in the Court of Session give their verdict both upon the facts and upon the law, taking the latter from the Judge as laid down in his charge, while in the Sheriff Court their function is not to give a verdict either upon the facts or the law, but to return specific answers to certain questions of fact proponed to them by the Sheriff, such facts being presumably the facts of the case which are relevant and material to the verdict which, applying the law, the Sheriff thereafter pronounces as applicable to the facts so ascertained. In other words, the jury find the facts and the Sheriff

[1] Baird *v.* Reilly, 1856, 18 D. 734; Cooper & Wood *v.* N. B. Rly. Co., 1863, 2 M. 117; Kyle & Cook *v.* Jeffreys, 1859, 3 Macq. 611.

[2] Addie *v.* Western Bank, 1865, 3 M. 899, *per* Ld. Deas; Wilson *v.* Boyle, 1889, 17 R. 62.

[3] Hogg *v.* Campbell, 1865, 3 M. 1018, *per* Ld. J.-C. Inglis.

[4] Wilson *v.* Boyle, *sup.*

[5] Glass *v.* Paisley Race Committee, 1902, 5 F. 14, *per* Ld. M'Laren; Connolly *v.* Clyde Navigation Trs., 1902, 5 F. 8.

applies the law, just as in an ordinary case where proof has been led the Sheriff in his interlocutor first pronounces certain findings in fact, and then lays down the law which in his opinion results from such findings. But the jury have no concern with the law of the case, and therefore there does not appear to be any reason for any such direction in law being given to them by the Sheriff. Besides, contrary to the rule in the Court of Session, any charge to the jury seems to be entirely optional on the Sheriff's part. But if the Sheriff decides that no charge to the jury is necessary, an exception on the ground that he has failed to give a necessary direction seems to be competent. Though the Sheriff may be the Judge as to whether a charge is necessary, an exception would not be barred, because before it was taken the Sheriff had decided not to charge the jury. But it would seem that if an exception is competent on the ground that the Sheriff has misdirected the jury, such erroneous direction must be upon a question of fact. But an error on a point of fact can be corrected immediately by a reference to the notes of evidence. Conceivably, though most improbably, the section has reference to certain incidental matters to which, in charging the jury with reference to the facts of the case, the Sheriff may allude, such as the credibility of the witnesses and the weight which ought to be attached to the evidence, oral and written, adduced by the parties; but as the jury are the arbiters on the facts of the case, such an interpretation of the meaning of the section seems to be unwarranted.

**Grounds on which no Appeal Competent.**—In the Court of Session a motion for a new trial is competent on various grounds other than those specified, as for instance on the ground of *res noviter*, or of such other cause as is essential to the justice of the case. Among the latter which may conceivably arise with regard to trials in the Sheriff Court are objections such as that the jury have legally erred in the mode by which they have arrived at their verdict,[1] as where one visits the *locus*; that one of the jury is a convicted criminal,[2] or is otherwise disqualified[3]; that the answers of the jury to the questions of fact are ambiguous or insufficiently specific to enable the Sheriff to determine the law of the case[4]; that there has

[1] Stewart *v.* Fraser, 1830, 5 Mur. 166; Sutherland *v.* Prestongrange Coal & Fire Brick Co., 1888, 15 R. 494; Hope *v.* Gemmell, 1898, 1 F. 74.

[2] Smith *v.* Knowles, 1824, 3 Mur. 419.

[3] Watson *v.* N. B. Rly. Co., 1901, 3 F. 342.

[4] Cal. Rly. Co. *v.* Lockhart, 1854, 17 D. 25.

been fraud in the case, as where a letter is admitted in evidence the date of which is false[1]; or that there has been a misunderstanding on the part of the jury as to the verdict.[2] Finally, there is a class of case in which the Court of Session will grant a new trial on the simple ground that it is satisfied that to allow the verdict to stand would be tantamount to a denial or miscarriage of justice. Among this class are those in which a motion for a new trial is made on the ground of "surprise." Thus, where the issue which is put before the jury is whether the pursuer was injured through the defender's fault, if the defender takes no counter issue of contributory negligence and the record contains no averments from which contributory negligence can be construed, the Court will grant a new trial if the jury negative the pursuer's issue on the ground that the evidence has proved that there was contributory negligence, since in such a case the pursuer has not been led to expect evidence of his contributory negligence to be led.[3] If, on the other hand, while there is no counter issue of contributory negligence, the defender have made averments from which such negligence can be inferred, and the jury negative the issue for the pursuer, and find that there was contributory negligence on his part, the Court will not grant a new trial, the pursuer not being able to plead that he has been taken by surprise.[4] The grounds of appeal laid down by the Act of 1907 are, however, limited to those mentioned, and appeal on any other ground would appear to be absolutely excluded. Apparently, therefore, the remedy in such exceptional cases, where the application of the verdict of the jury on the questions of fact would be tantamount to a denial or a miscarriage of justice, will be by an action of reduction or of suspension in the Court of Session.

**Procedure in Appeal.**—Within three days of the lodging of the note of appeal the process is transmitted by the Sheriff-Clerk to the principal Clerk of Session, and intimation sent to the other parties in the case.[5] If production of the notes of evidence is ordered by the appellate Court, it is the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to

[1] Miller *v.* Fraser, 1825, 4 Mur. 118.

[2] Fullerton *v.* Cal. Rly. Co., 1882, 10 R. 70; Pirie *v.* Cal. Rly. Co., 1890, 17 R. 1157.

[3] Crawford *v.* Lusk's Trs., 1884, 12 R. 25.

[4] Murray *v.* Lanark Rd. Trs., 1888, 15 R. 737.

[5] Act, Rule 149.

lodge them with the principal Clerk of Session.[1] If on appeal the Judges are equally divided in opinion, the verdict stands.[2] If the Court orders a new trial, the principal Clerk of Session re-transmits the process to the Sheriff-Clerk, and the Sheriff as soon as practicable fixes a date of new trial, which proceeds in the same way as the original trial.[3]

**Expenses.**—The ordinary rules as to expenses apply in the case of jury trials. There is only one scale of taxation, and the fees are regulated by Chapter II. of the Act of Sederunt of 10th April 1908.

[1] Act, Rule 137. [2] Act, sec. 31. [3] Act, Rule 150.

NOTE.—*The case of Adamson* v. *Fife Coal Co. Ltd., decided by the Second Division on 19th February* 1909 (1 *S.L.T.* 196), *was reported while the volume was passing through the press. The views expressed in the text with reference to the points decided appear to be generally in consonance with the opinions of the learned Judges.*

# PART IV

## SPECIAL ACTIONS AND THOSE NECESSITATING SPECIAL PROCEDURE

# INTRODUCTORY

THE terms "ordinary action" and "ordinary procedure" are not defined by the Act. All actions for payment of money exceeding £50, claimed to be due either as debt or damages, may conveniently be described as "ordinary" actions, and the procedure following upon the claim or demand as the "ordinary" or normal procedure. An "ordinary" action, therefore, is one in which the "ordinary" procedure is followed, the type of which is a claim for payment of money exceeding £50. There are, however, besides summary actions and summary applications, a considerable number of actions competent in the Sheriff Court in which the procedure, initial or subsequent, diverges more or less materially from that usually or normally followed. In some kinds of action embraced in this category the procedure is substantially that which is followed in the ordinary case, the procedure differing or calling for special notice in virtue of some peculiar feature only in certain incidental points. As examples of such cases may be taken actions *ad facta præstanda*, actions of aliment, petitions for interdict, multiplepoindings, and actions of removal and of sequestration for rent. In another class of cases certain special requirements have to be observed, the procedure not infrequently beginning to vary with the warrant of citation, and continuing more or less throughout the whole course of the progress of the cause to present differences and divergencies from that ordinarily followed. To this class of actions belong those for the appointment of Judicial Factors, or of Tutors, Curators, and Guardians, and those having reference to entailed estates and actions of law-burrows. In dealing with such special cases, the various points in which the procedure differs from the ordinary will be incidentally noticed, it being premised that, so far as not specially mentioned, the ordinary procedure is applicable to such actions.

# CHAPTER XXVII

## ACTIONS *AD FACTA PRÆSTANDA*, OF CONSTITUTION AND ADJUDICATION, COUNT AND RECKONING, EXHIBITION, INTERDICT AND BREACH OF INTERDICT, LAW-BURROWS, AND SUSPENSIONS.

### I. ACTIONS *AD FACTA PRÆSTANDA*


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ACTIONS *ad facta præstanda* are divided into two classes, those in which delivery of a specific article or articles is craved, and those in which the implement of a specific obligation is asked. The Act of 1907 contains no definition of actions *ad facta præstanda*. Under the Debtors' Act of 1880, which abolished civil imprisonment for debt, imprisonment on decrees *ad facta præstanda* was reserved from its operation, but the Act gave no definition of the actions which were embraced in the category of actions *ad facta præstanda*. But the Act of 1907 specially excludes all such actions, irrespective of their value, from the category of summary causes, presumably to prevent a creditor, after merely summary procedure and without his debtor's consent, obtaining a decree on which his debtor might be imprisoned. And the reason why the Debtors' Act declared that nothing in its terms should prevent a party being imprisoned under a decree *ad factum præstandum*, was simply that if the right to imprison in such cases were abolished no alternative method of enforcing such decrees would remain.[1] Obviously, from this *dictum*

[1] Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147, *per* Ld. Pres. Inglis.

it would seem necessarily to follow that actions *ad facta præstanda* may be defined as those which crave a decree upon which imprisonment may follow, and a decree *ad factum præstandum* as a decree which imprisonment is the only competent method of enforcing.

**Action of Delivery.**—The action may contain only conclusions *ad facta præstanda*, that is, for delivery of the article or articles in dispute without any alternative crave for a payment in money, or it may conclude, in addition to the crave for delivery, for an alternative sum of money in the event of the defender failing to make delivery. In the former case the decree may be enforced by imprisonment; in the latter, imprisonment is incompetent, but ordinary diligence may follow on the decree for payment. Or the writ may, in addition to the crave for delivery, contain a crave for authority to officers of Court to search for and take possession of the article or articles demanded, in which case the decree may be carried out accordingly.[1]

**Action for Implement.**—In such actions the crave must ask for implement of the obligation or contract entered into by the defender to the pursuer, the terms of the obligation or contract, as the case may be, being shortly described, and must state precisely in what respect implement is sought and in what way the desired implement is to be effected[2]; or it must ask the fulfilment of an obligation or the performance of an act, the obligation or act being shortly described, which the defender has bound himself to fulfil, do, or perform, as the case may be, by a contract or deed which is shortly described.

**Nature of Decree *ad factum præstandum*.**—In pronouncing a decree *ad factum præstandum*, the Court must bear in mind the consequences and sanctions of such a decree, which may expose the defender to penal consequences, and must accordingly express the decree in such terms as to leave the defender no room for doubt regarding the obligation which he is called upon to discharge or the measure of his liability. To pronounce a decree, therefore, for implement "forthwith" may be appropriate with regard to a single

[1] *See* Brand *v.* Shaws, 1888, 15 R. 449, where such a warrant was asked for, and no disapproval expressed. *See* also Ferguson's *Cur. bon.*, 1905, 7 F. 898, and *infra*.

[2] Robertson *v.* Cockburn, 1875, 3 R, 21.

act, such as the delivery of a writ, which is completed instantly on its commencement; but it is not proper to pronounce such a decree in the case of such an act as the building of a house, which must be a comparatively lengthened operation requiring a measurable tract of time for its execution.[1] The interlocutor should therefore in all such cases specify precisely the time within which the decree of the Court must be obtempered.[2] And it must not be forgotten that the Sheriff is not bound to pronounce, or perhaps more strictly must refuse to pronounce, any decree *ad factum præstandum* which may be disobeyed without his having any means to enforce obedience to it. The test, therefore, of the competency of an action *ad factum præstandum* is not only whether the Sheriff has power to grant the decree craved, but in addition whether he also possesses the power to enforce the decree craved if it be granted. This principle is illustrated in two cases, in one of which a member of a horticultural society craved decree that the executive body of the society should be compelled to receive his exhibits, which they had refused to do; and in the other, a member of a friendly society, from which he had been expelled, sought to compel the society to re-admit him to membership. In the former case it was pointed out that if the pursuer had suffered any wrong his remedy was to sue for damages, but that the Court would not interfere to order specific performance of an act of which specific performance was manifestly impossible.[3] In the latter case it was also pointed out that if the pursuer had been wrongfully or illegally expelled from the society of which he was a member, the Court might competently grant compensation for any injury or loss such expulsion or exclusion might infer, but that as it could not make the society admit as a member a person whom they did not desire to receive, the Court would not grant a decree, obedience to which they had no power to enforce.[4]

**Value of Cause.**—Where the value of the cause is not disclosed in an action *ad factum præstandum*, it is deemed to exceed £50, unless in the course of the cause the Sheriff determines otherwise.[5] The determination of such value may, after inquiry, be arrived at in any way which the Sheriff thinks expedient, and his determination is

[1] Middleton *v.* Leslie, 1892, 19 R. 801, *per* Ld. Pres. Robertson.

[2] *See* M'Lintock *v.* Prinzen, 1902, 4 F. 948.

[3] Cocker *v.* Crombie, 1893, 20 R. 954, *per* Ld. Young.

[4] Gall *v.* Loyal Glenbogie Lodge, 1900, 2 F. 1187, *per* Ld. Trayner.

[5] Act, s. 7.

final as regards the competency of the action on the ground of value.[1] The determination of the value of the cause is material, not as regards the competency of the action on the ground of value, but as regards the competency of appealing the judgment of the Sheriff to the Court of Session on the ground of value, which is presumably the construction which must be put upon the phraseology of the latter part of the second section quoted. The consideration of these sections, the construction of which presents some difficulties in other respects, is reserved for the chapter dealing with the subject of appeals to the Supreme Court.

**Enforcement of Decree.**—Up to the time when decree is obtained, the procedure in actions *ad facta præstanda* follows the ordinary and usual course. A decree *ad factum præstandum* can, in the Sheriff Court, be enforced only by imprisonment, and the enforcement of the decree must be effected in the regular manner by extracting the decree and giving a charge upon it. The Supreme Court has, however, in the exercise of its *nobile officium*, power to make an order for compelling obedience to its decree by other means than imprisonment, as for instance by granting warrant to open shut and lockfast places in cases where it is manifest that the enforcement of the decree by imprisonment will not have the effect of compelling the defender to obtemper the decree of Court. Imprisonment is only *in modum pœnæ*, and its object is to compel performance; if then it fails in that object, the Court in the exercise of its power will have recourse to other means to compel obedience.[2] But in the Sheriff Court, where there is no such power, a decree to search, seize, etc., can only be granted if it is specially craved, and if there be no alternative conclusion the decree can only be enforced by imprisonment.[3] It is incompetent in the course of the proceedings to grant a summary warrant for the imprisonment of the defender for failure to implement the obligation or perform the specific act demanded in the writ.[4] The interlocutor granting decree should specify a time within which delivery is to be made or implement is to be effected,[5] and if no time be stated, the extract, under

[1] Act, s. 9.

[2] Ferguson's *Cur. bon.*, 1905, 7 F. 898, *per* Ld. Pres. Robertson.

[3] Mackenzie *v.* Balerno Paper Co., 1883, 10 R. 1147.

[4] Murray *v.* Bisset, 15th May 1810, F.C.; Haig *v.* Buchanan, 1823, 2 S. 412; Morrison *v.* Cuthbert, 1835, 13 S. 772.

[5] *See* Macdonald *v.* Mackessack, 1888, 16 R. 168; *see sup.*

the provisions of the Sheriff Courts Extract Act, 1892,[1] may contain a warrant to charge on seven days' induciæ.[2]

**Charge to Deliver or Perform.**—The defender must be charged to deliver the article sought, or to implement the obligation demanded, in the same way and according to the same regulations as under an ordinary decree.[3]

**Warrant to Imprison.**—The procedure for obtaining a warrant to imprison upon the expired charge is regulated by sections 10 and 11 of the Debtors' Act of 1838, and the Sheriff Courts Extracts Act of 1892. If the decree extracted is for the payment of money, or among other things for the payment of money, the warrant for execution authorises a charge within the appropriate days to pay such sum under pain of poinding and arrestment; if the decree be for performance of an act or implement of an obligation other than the payment of money, the warrant authorises a charge to perform the act or implement the obligation under the pain of imprisonment; and if the decree is for payment of money (that is, of expenses), and also *ad factum præstandum*, the warrant authorises a charge both to pay under pain of poinding and arrestment, and to perform the act or implement the obligation under pain of imprisonment.[4] An order to make consignation of a sum of money is a decree *ad factum præstandum*, upon failure to obtemper which imprisonment may competently follow.[2] Before diligence against the person can be done, the execution of the charge must be registered in the Court of the Sheriff from which the extract was issued, and that within a year and a day after the expiry of the charge.[5] The clerk who registers it enters the name and designation of the person by whom the extract and execution were presented, along with the date of presentation. After registration, the Sheriff-Clerk writes on the extract (and upon the execution if it be separate) a certificate of registration, which he dates and subscribes.[6] The pursuer or his agent must then indorse and subscribe on the extract a minute, in the terms of the schedule annexed to the act,[7] which must be strictly adhered to, craving a warrant to search for, take, and apprehend the person of the defender, and on his apprehension to imprison him

[1] Secs. 4, 7 (2).
[2] M'Lintock *v.* Prinzen, etc., 1902, 4 F. 948.
[3] *See ante*, Execution upon Decree.
[4] Sh. Cts. Ext. Act, 1892, s. 7.
[5] Debtors' Act, 1838, s. 10.
[6] *Ibid.*, s. 11, and Sch. No. 7.
[7] Sch. 8.

till he fulfils the charge, and, if necessary for that purpose, to open shut and lockfast places. The minute need not be holograph of the pursuer or his agent.[1] If the warrant is desired by an assignee of the pursuer, authority must be obtained in the same way as if the charge were to be given by such assignee.[2] The statutory form requires the place and date of the minute to be given, and if they are omitted the minute will be invalid[3]; but it is not an objection that the date shows the minute to have been written before the execution is registered, if it have not been used till after.[1] On presentation of the minute, if there be no lawful cause to the contrary, the Sheriff-Clerk writes on the extract the deliverance *Fiat ut petitur*, which he dates and subscribes. In virtue of this deliverance it is lawful to take all the steps for which authority was craved by the minute, and all keepers of prisons are bound to receive and detain the defender till liberated in due course of law.[4] An order to consign money admittedly in the hands of the defender is a decree *ad factum præstandum*, and is therefore enforcible by imprisonment.[5]

**Apprehension of the Defender**, which is effected in the usual way,[6] cannot competently be effected on Sunday, nor apparently on days proclaimed as "fasts" by Government.[7] After apprehension it is the duty of the officer to convey the defender to the nearest prison, unless he is so ill as to make his removal dangerous, or he agrees to some other course in order to have an opportunity of settling the claim.[8]

**Imprisonment of Defender.**—The defender is entitled at any time to require exhibition of the authority by virtue of which he is detained, and the warrant (or a certified copy of it) under which the apprehension was effected must therefore be deposited with the keeper of the prison, who enters the defender's name in the prison books, stating the cause of his detention.

*Aliment while under Detention.*—The defender is not entitled to aliment out of the public funds, and if he be unable to aliment

[1] Allan *v.* Miller, 1848, 10 D. 1411.

[2] Debtors' Act, 1838, sec. 12.

[3] Jameson *v.* Wilson, 1853, 15 D. 414.

[4] Debtors' Act, 1838, s. 11.

[5] Mackenzie *v.* Balerno Paper Mill Co., 1883, 10 R. 1147, decided by a majority of seven judges, Lords Shand and Craighill dissenting.

[6] *See* Scott *v.* N. of Scot. Bank, 1855, 17 D. 292.

[7] Bell's Com., 7th ed., 2, 460.

[8] Garden *v.* M'Coll, 1826, 5 S. 123.

himself the creditor is bound to do so,[1] though it would appear that if his imprisonment is the result of his failure to perform an act, performance of which is within his power, the creditor cannot be compelled to aliment him.[2] The creditor must, however, usually by the hand of the officer who conveys the defender to prison, provide the sum of ten shillings to meet any claim for interim aliment by the defender,[3] that sum being disbursed by the keeper of the prison on the defender's behalf at a rate not exceeding one shilling per day.[4] If, however, the prisoner does not apply for, or is not found entitled to aliment, any sum expended out of the ten shillings on his behalf becomes a debt due by him to the incarcerating creditor.[4] Under the Act of Grace[5] the defender may apply to the Sheriff[6] to be alimented, and the Sheriff thereupon fixes a time for his examination on oath, at the same time, where convenient, appointing intimation to be made to the incarcerator or his agent[7]; or if there be more than one incarcerator, to that one from whom aliment is claimed.[8] At the time fixed the prisoner is examined on oath regarding his ability to aliment himself, the examination being confined to that question.[9] The prisoner's oath as to his ability to aliment himself is conclusive in the first instance, though the creditor may adduce evidence to contradict it.[10] But a prisoner obtaining aliment is bound to execute a disposition *omnium bonorum* for behoof of his creditors, and as under this disposition the creditor may take any property of the defender of which he has knowledge,[11] it is seldom worth his while to lead evidence in contradiction of the defender's oath. The disposition requires no stamp.[12] The Sheriff then grants or refuses the application in his discretion. If aliment is awarded, the creditor must within ten days lodge money to meet

[1] Smith *v.* Nicolson, 1853, 15 D. 697.

[2] Brechin *v.* Taylor, 1842, 4 D. 909.

[3] 6 Geo. IV. c. 62.

[4] Civil Imprisonment Act, 1882, s. 8.

[5] 1692, c. 32, as amended by 6 Geo. IV. c. 62.

[6] Formerly to the Magistrates, but see 7 & 8 Vict. c. 34, s. 13; 23 & 24 Vict. c. 105, s. 76; 40 & 41 Vict. c. 23, definition clause.

[7] M'Kenzie *v.* M'Lean, 1830, 8 S. 306.

[8] Anderson *v.* Dingwall Mags., 1823, 2 S. 116.

[9] The A. S. of 12th Nov. 1825, part II. c. 4, contains the sole instruction extant on the point.

[10] A. S. 12th November 1825, *ut sup.*

[11] 6 Geo. IV. c. 62, s. 7.

[12] 55 Geo. III. c. 184, Sch. ii. s. 5; Rae *v.* Henderson, 1837, 15 S. 653. The exemption is not affected by 33 & 34 Vict. c. 97 and c. 99.

the defender's aliment, past due and future.[1] The day of imprisonment is not counted.[2]

**Liberation of Defender.**—The defender may be liberated (1) on performance of the obligation in respect of the failure to implement which he has been incarcerated; (2) by the written consent of the incarcerator[3]; (3) by the failure of the incarcerator to provide aliment if he have been ordained to do so[4]; (4) by the order of the Court on whose warrant he was imprisoned; and (5) by the Court of Session in the exercise of their equitable power, in a process of suspension or of suspension and liberation, if the incarceration were the result of a decree *ad factum præstandum* which it was out of his power to obey.

**Re-imprisonment.**—When the defender has been liberated for any cause less than the performance of the obligation or an order of protection, he may be re-imprisoned on the same diligence.[5] The Court of Session may, however, interfere should this power be used oppressively.[6]

## II. Actions of Constitution and Adjudication

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**Action of Constitution.**—Every decree by which the extent of a debt or obligation is ascertained, is a decree of constitution; but the term is usually applied specially to those decrees which are requisite to found a title in the person of the creditor, in the event of the death of either the debtor or the original creditor. Thus, where the debtor dies, the creditor must obtain a decree constituting the debt against the heir of the debtor before he can proceed with diligence to attach the debtor's heritable or moveable property, unless the heir chooses voluntarily to grant a new obligation in his own

[1] M'Iver *v.* Linlithgow Mags., 1832, 11 S. 144.

[2] Gibb *v.* Hamilton Mags., 1833, 12 S. 28; *see also* Thomson *v.* Mags. of Kirkcudbright, 1878, 5 R. 561.

[3] *See* Campbell *v.* Mullen, 1850, 13 D. 78.

[4] Act 1696, c. 32. If aliment be not lodged on the tenth day from intimation, the debtor is liberated: Hood *v.* Mackirdy, 14th Dec. 1813, F.C.; where a third of a day's aliment is left it is premature to liberate in the morning: White *v.* Robertson, 1858, 21 D. 28.

[5] Forgie *v.* Stewart & Macdonald, 1876, 3 R. 1149; Pender *v.* Macarthur, 1846, 8 D. 408.

[6] *See* Crawford *v.* Dawson, 1836, 14 S. 688.

name for the debt; or unless he renounces the succession, in which last case a decree of cognition is pronounced.[1] When the deceased debtor is represented by executors who have confirmed, the action is in common form and concludes against the executors, as such, for payment of the debt. Such an action should, however, conclude for expenses against the executors only if they appear and oppose.[2] An executor cannot safely pay a doubtful debt without a decree, and the creditor is bound to constitute his debt against his debtor's representatives at his own expense. When, therefore, no defence is offered, the executors are not liable in expenses.[3] The defender may even be held entitled to his expenses, if a formal defence be necessary to enable such decree to be pronounced.[4] And though where he conducts a litigation reasonably the defender may not be found liable in expenses,[5] the general rule is that if the executor opposes the constitution of the debt he will be liable in expenses in the usual way.[6] In this connection it must be kept in view that an executor cannot be compelled to pay a debt admittedly due till six months after the debtor's death. Persons entitled to the office of executor to the deceased debtor, who have not taken the necessary steps to have themselves confirmed executors, cannot, in general, be summoned in an action of constitution without previously being "charged" to take up office. Where, however, persons have acted as executors without authority, a decree of constitution is competent against them without any previous charge. And where the creditor of a deceased person sues his heir with a view to constitute the debt against him and attach the deceased's heritage, if the heir appears and renounces, the Court will pronounce a decree for the amount of the debt, which is called a decree *cognitionis causa*, in virtue of which the creditor may proceed to adjudge the heritage of the deceased debtor. So also in the case of moveable succession, the creditor of a deceased person whose debt is not constituted, may charge the defunct's next-of-kin, and such persons as he may have nominated as his executors by will, to confirm as executor within twenty days after the charge, which charge constitutes a passive title against the

[1] Bell's Dict., *s. h. v.*

[2] E. of Rosslyn *v.* Lawson, 1872, 9 S.L.R. 291.

[3] Russell *v.* Sime, Bell's 8vo Ca., 156.

[4] Carruthers *v.* Hogg, 1828, 7 S. 81; Melville *v.* Preston, 1841, 3 D. 1101.

[5] Law *v.* Humphrey, 1876, 3 R. 1193.

[6] Smith *v.* Kippen's Jud. Fac., 1860, 22 D. 1495.

persons charged, unless they renounce the succession. The creditor may then proceed to have his debt constituted, and the *hæreditas jacens* of moveables declared liable by a decree *cognitionis causa*, upon obtaining which he may be confirmed executor-creditor.[1] Such a decree imposes no kind of obligation on the persons called as defenders.[2] As in the case of actions against executors who have confirmed, expenses should not be asked except in the case of opposition. If the action have been brought for the ordinary decree, the conclusions may be restricted to a crave for decree *cognitionis causa* only, but in such a case the defenders would be entitled to the expense of appearing to get this restriction made. Where, however, after a charge, the persons entitled to be confirmed executors do not take the trouble either to obtain confirmation or to renounce the succession, but admit in an action of constitution that decree must pass against the executry estate, they may be found liable in the expenses occasioned by their negligence.[3]

**Action of Adjudication.**—When the debtor's apparent heir, who has been charged to enter, renounces the succession, the creditor obtains a decree *cognitionis causa*, by which the *hæreditas jacens* of the debtor is subjected to the creditor's diligence, the purpose of the decree being to ascertain the amount of the debt, so that adjudication may proceed against the deceased's heritage. Where the heir is expected to renounce the succession, a conclusion for adjudication is introduced into the writ of constitution, so that, when the heir renounces, decree of adjudication *cognitionis causa* may be pronounced. Adjudications *contra hæreditatem jacentem* were in use before 1672, c. 19, and hence, as the exclusion of inferior Courts applicable to adjudications substituted by that Statute for apprisings does not apply, such actions are competent in the Sheriff Court in the jurisdiction of which the subjects are situated. Such actions are, however, seldom raised, except in the Court of Session.[4]

[1] Bell's Dict., *s. h. v.*

[2] Forrest *v.* Forrest, 1863, 1 M. 806.

[3] Davidson *v.* Clark, 1867, 6 M. 151.

[4] Their competency in the Sheriff Court since the passing of the more recent conveyancing Statutes has been doubted by so high an authority as the late Professor Dove Watson (*see* Practice, p. 395).

### III. Count, Reckoning, and Payment

In this action, which commences by initial writ in the usual way, the pursuer concludes against the defender for exhibition of the accounts between them, and for payment of the balance which on a just accounting may be found to be due to the pursuer. The writ usually contains an alternative crave for payment of a specified sum in the event of the defender failing to produce the accounts, but this conclusion is not essential, and if omitted it may be supplied by amendment.[1] The use of such a conclusion is to enable the pursuer to get decree for a definite sum in the event of the defender's failure to defend the action, or appearing to defend but failing to account. If, however, the accounting take place, the amount stated in the pursuer's claim does not limit the amount to which he may be found entitled; he will get decree for whatever sum the adjustment of the accounts shows to be the balance due. The defender may defend the action on two separate grounds: he may in the first place lodge objections to the production of the accounts, on such grounds, *e.g.*, that he is under no liability to do so, or that he has already done so; and he may in the second place lodge objections to the accounts themselves. Where objections to the production of the accounts are lodged, the record is closed in the usual way, and a decision is pronounced on the question of the pursuer's right to an accounting with the defender. Only in very exceptional cases would the Court order production of the accounts before deciding whether the pursuer had established a right to their production. If then no defence is stated with regard to the defender's liability to account, or if such defence have been stated and repelled, production of the accounts is ordered by the Sheriff. Such an interlocutor, being an order *ad factum præstandum*, is appealable without leave.[2] After the accounts have been lodged, if the amount due be disputed, the pursuer is allowed, if so advised, to lodge objections to them, and the defender to lodge answers to such objections within a specified period.[3] Subsequent procedure depends upon the nature of the objections stated. If only questions of law are involved, the case may be disposed of after a debate by the parties.[4] If questions of fact, and more especially of

[1] Dobson *v.* Hughson, 1858, 20 D. 610.

[2] Act, s. 27 (b).

[3] *See* A. S., 10th July 1839, s. 87.

[4] *See ibid.*, ss. 88, 89.

accounting, are involved, a proof will be ordered. But it is usual, and in practice has been found convenient, to make a remit to an accountant to report upon the accounts. Such a remit may be made before or after the proof, or instead of it, according to circumstances. As a rule, investigation will not be allowed until the pursuer has stated his objections, but where he can establish his interest to have an accounting, and is unable to state his objections without being afforded an opportunity of seeing the accounts, a diligence may be granted for their recovery.

It is important to bear in mind that where the crave is for an accounting in the ordinary form, only the intromissions down to the date of citation can be competently considered. If an accounting down to the date of decree be desired, as, *e.g.* in the winding-up of a trust estate, the crave must specifically contain such conclusions, unless the parties consent.[1]

## IV. Action of Exhibition

This is an action for compelling the production or delivery of writings, and may be resorted to either for the recovery of documents or writings belonging to the pursuer in the defender's possession, or it may be raised at the instance of an apparent heir to force production of writings and title-deeds relative to his predecessor's estate, in order to enable the heir to deliberate as to the propriety of entering as heir, and thereby incurring responsibility for his predecessor's debts and obligations.[2] When in an action of exhibition the Sheriff is satisfied that the documents called for should be produced, the regular and proper course is to ordain that they be exhibited in the hands of the Clerk of Court.[3] The action may contain a conclusion that a copy of the writs be made and authenticated at the sight of the Court, in which case the action is one of exhibition and transumpt. Actions of exhibition are competent in the Sheriff Court though the deed relate to a heritable right, but if the pleas raise a question of heritable title to subjects exceeding £50 by the year or £1000 in all, either party may require the cause to be remitted to the Court of Session.[4]

[1] Wauchope *v.* N. B. Ry. Co., 1860, 23 D. 191; Wallace *v.* Henderson, 1875, 2 R. 999.

[2] *See* Campbell *v.* Campbell, 1869, 7 M. (H.L.) 101; Fulton *v.* Eglinton, 1878, 5 R. 752; Malcolm *v.* Dick, 1866, 5 M. 19, *per* Ld. Pres. Inglis.

[3] Clark *v.* Melville, 1880, 8 R. 81.

[4] Act, s. 5 (4) (5, a).

## V. Interdict and Breach of Interdict

### (*A*) Interdict


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### (*B*) Breach of Interdict


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**Nature of Remedy.**—The process of interdict in the Sheriff Court is analogous to the procedure in a note of suspension and interdict in the Court of Session. In the Sheriff Court it is a process whereby the Court is asked to prohibit a person or persons from doing or continuing to do some particular act or following out some particular course of action which is illegal or wrongful.[1] The act or course of action complained of must be illegal and wrongful,[2] and though reasonable apprehension of injury from the commission of the wrongful or illegal act will be sufficient,[3] the pursuer must possess a title and interest of an appreciable kind to entitle him to object,[4] and there must be proof either that the act has actually been committed or that its commission is threatened, before interdict will be granted.[5] Mere apprehension of possible evil is not a sufficient ground for craving interdict.[6] The repetition of an act which has been already committed may be interdicted,

[1] Kelso Sch. Bd. *v.* Hunter, 1874, 2 R. 228.

[2] For examples of acts which do not fall under this category, *see* Thom *v.* N. B. Bank, 1848, 10 D. 1254; Beattie *v.* Pratt, 1880, 7 R. 1171; Crawford *v.* Scot. Savings Socy., 1885, 12 R. 1033.

[3] Weir *v.* Glenny, 1834, 7 W. & S. 244; Hay's Trs. *v.* Young, 1877, 4 R. 398; Hood *v.* Traill, 1884, 12 R. 362.

[4] Winans *v.* Macrae, 1885, 12 R. 1051.

[5] King *v.* Hamilton, 1844, 6 D. 399; Macleod *v.* Davidson, 1886, 14 R. 92.

[6] *See also* Stewart *v.* Stephen, 1877, 4 R. 873; Lady Willoughby D'Eresby's Trs. *v.* Strathearn Hydro Co., 1873, 1 R. 35; Cal. Rly. Co. *v.* Glasgow Corporation, 1897, 25 R. 74; Licenses Insur. Corpn. *v.* Shearer, 1907, S.C. 10; Sibbald *v.* Mags. of Dundee, 1907, 14 S.L.T. 734 (O.H.).

and the performance, continuance, or repetition of an act threatened or begun, but not completed, may be prevented. The commission of the act complained of may be continuous in its operation or only repeated at intervals. If continuous, such as the illegal abstraction of water from a stream, the act must be one of comparatively recent origin to found an action for interdict; if the act have been continuously committed for such a lengthened period of time as to have been acquiesced in, an action of declarator, and not of interdict, against its continuance is the appropriate remedy.[1] But an act such as trespass, which is not continuous but only committed at more or less frequent intervals, may be stopped at any time,[2] provided there is a relevant averment that its repetition is actually threatened or apprehended.[3] Thus interdict will not be granted against the repetition of an act which, though illegal, has been committed in good faith, if there be no reasonable apprehension that it will be repeated, as for instance where a person in good faith entered upon certain lands and dug holes in order to trace the course of an old drain for the purpose of a jury trial.[4] An interdict is granted against an individual only in respect of what he himself does or threatens to do, and so the process cannot be transferred against another person who comes in place of the original defender. Thus, where an application had been presented to have the owner of lands adjoining a stream interdicted from polluting it, and he, prior to the decree, had sold the lands, a motion for transference of the process against the singular successor was refused.[5] The mere fact, however, that the respondent is willing to grant an undertaking to discontinue the operation complained of, will not of itself disentitle the complainer to obtain the decree he asks.[6] An application for interdict must be timeous, though what is timeous is a question of circumstances. It is not, however, sufficient objection that the act complained of has been begun or is in course of completion, provided matters have not gone so far as to make the remedy sought of no avail. Prior to the Court of Session Act of 1868, the general

[1] Grierson *v.* Sandsting Sch. Bd., 1882, 9 R. 437; Hoyle *v.* Shaw's Water Co., 1854, 17 D. 83.

[2] Dickson *v.* Dickie, 1863, 1 M. 1157.

[3] Hay's Trs. *v.* Young, 1877, 4 R. 398; Robertson *v.* Wright, 1885, 13 R. 174.

[4] Hay's Trs. *v.* Young, *sup.*

[5] Bankier Disty. Co. *v.* Young's Collieries Co., 1899, 2 F. 89.

[6] Smith & Wellstood *v.* Carron Co., 1895, 3 S.L.T. 351 (O.H.).

rule in that Court was that where the act was completed, or even in some cases approaching completion, interdict was no longer timeous to restore a state of matters already inverted. But, under the Act referred to,[1] where the respondent in an application for interdict has done an act which the Court in the exercise of its preventive jurisdiction might have prohibited, the Court may, upon a prayer to that effect, ordain him to perform any act necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of. But even under the power thus conferred, the exercise of which is peculiar to the Supreme Court, the Court will not ordain the defender to perform an act, even though it may be necessary to reinstate the complainer in his possessory right, if the state of matters be such that it is practically impossible for the respondent to undo what he has already done. To borrow a familiar illustration, the Court will not lock the door of the stable after the steed has been stolen.[2] Thus, even in the Court of Session, where a note was presented to have the respondent restrained from erecting buildings on a piece of ground in breach of an agreement, the note was refused *de plano*, on the ground that the buildings objected to had already been erected.[3] So, in the Sheriff Court it will be too late to ask for interdict against building on a piece of ground on which the buildings have already been either wholly or even half built.[4] But there would seem to be no valid objection to the granting of interdict in such a case if the building has only just begun, or is not advanced beyond the stage at which restitution of matters is not impossible. While it is obviously absurd to crave by interdict a remedy against a state of matters which in such cases cannot be prevented, it is always open to the pursuer to obtain, by declarator, removing, ejection,[5] or by petition for redelivery, a remedy against the wrongful or illegal act of which he complains.

**Form of Application.**—The process is commenced by initial writ in the usual form, and the grounds on which interdict is craved are specified. The crave must be expressed in terms which show distinctly and unambiguously the specific act or acts which it is

[1] Sec. 89.

[2] *But see* Clippens Oil Co. *v.* Edin. & Dist. Water Trust, 1897, 25 R. 370.

[3] Heriot's Trs. *v.* Carter, 1902, 10 S.L.T. 323 (O.H.).

[4] Lowson's Trs. *v.* Cramond, 1864, 3 M. 53.

[5] Johnston *v.* Thomson, 1877, 4 R. 868.

desired to prohibit, so that in the event of decree being granted in terms of the prayer the respondent may know precisely what acts are and what are not permissible, without committing a breach of interdict.[1] The writ should always contain a crave for interim interdict, though it is not doubtful that in a defended action interim interdict may be granted without any special craving. The application may be combined with any other conclusion, such as for damages, competent in any ordinary action. The process is not suitable for trying questions of heritable title, as for instance the ascertainment of the rights of adjoining proprietors.[2] The application must be directed against a specified person or persons; a decree of interdict affects only those respondents named in the decree. It is therefore incompetent to bring an application for interdict against certain named persons and others not named.

**Interim Interdict.**—Where it is necessary to have the existing state of matters preserved until the rights of the parties can be determined, interim interdict may be granted. When the commission of a threatened act is immanent, and it becomes necessary to obtain an interim order with the least possible delay, interim interdict may be granted solely on a consideration of the pursuer's averments, though it should not under any circumstances be granted without due regard to the consequences both of granting and refusing it. It is granted *periculo petentis*,[3] and if ultimately recalled subjects the pursuer to damages, unless equitable considerations prevent their imposition.[4] It may, however, be granted only upon caution for damages,[5] and it may be refused if caution be found by the opposite party.[6] When interim interdict is granted upon caution being found, the respondent is not thereby fettered, and the commission of the act against which interdict is craved, before such caution is found, will not support a claim of damages for breach of interdict.[7] If granted before the respondent has had an opportunity of being heard, it may be recalled when he enters appearance; in any event, interim interdict is liable to be recalled at any time.

[1] Cathcart *v.* Sloss, 1864, 3 M. 76; Cairns *v.* Lee, 1892, 20 R. 16.

[2] Ligerwood *v.* Lanark & Dumbartonshire Rly. Co., 1903, 11 S.L.T. 24 (O.H.).

[3] Fife *v.* Orr, 1895, 23 R. 8.

[4] Glasgow City & Dist. Rly. Co. *v.* Glasgow Coal Ex., 1885, 12 R. 1287.

[5] *See* Curtis *v.* Sandison, 1831, 10 S. 72; *see also infra.*

[6] Johnston *v.* Dumfries Rd. Trs., 1867, 5 M. 1127.

[7] Wilson *v.* Gilchrist, 1900, 2 F. 391.

*Intimation* of the interim interdict is absolutely necessary where the respondent or his agent has not been present when it was granted, but if the respondent is aware that interdict has been granted, the mere fact that intimation has not been made to him will not absolve him from the consequences attendant on a breach of the interdict[1]; all that is absolutely necessary is evidence that the interdict was as a matter of fact known to the respondent.[2] Intimation, where necessary, may be made by an officer of Court or a notary, but intimation by registered letter though inexpedient in view of the penal consequences which may result from a breach, seems perfectly competent. When the respondent is represented in the cause by an agent, but neither is present at the granting of the interdict, the agent's subsequent knowledge will be presumed to be that of the respondent also, though the presumption may be rebutted by proof of actual and excusable ignorance. An interlocutor continuing an interim interdict is intimated in the same way as one granting it. An interlocutor granting or refusing interim interdict may be appealed to the Sheriff.[3] An interim interdict subsists until expressly recalled by a competent Court, or till the question is finally disposed of in the action.[4] If interim interdict granted by the Sheriff-Substitute is recalled by him, an appeal against the interlocutor recalling has not the effect of continuing the interdict, the position of the process after the recall being the same as if interim interdict had never been granted.[5]

**Caveat against Interim Interdict.**—If the defender has reason to anticipate an application for interim interdict against him, he may enter a caveat with the Sheriff-Clerk, the effect of which is to ensure that on presentation of the application, notice will be sent to him and an opportunity afforded him of being heard before the interdict is granted. The caveat will apparently hold good for one month, and presumably may be renewed from time to time.[6] He must, however, be prepared to discuss the question immediately on receipt of notice.

[1] Henderson *v.* M'Lellan, 1874, 1 R. 920.

[2] Clark *v.* Stirling & Others, 1839, 1 D. 970, *per* Ld. M'Kenzie.

[3] Act, s. 27; *see* Argyll *v.* Macarthur, 1861, 23 D. 1236.

[4] Clippens Oil Co. *v.* Edin. Water Trust, 1906, 8 F. 731; 1907, S.C. (H.L.) 9; Home-Drummond & Others *v.* M'Lachan, 1908, S.C. 12, *explaining* Hamilton *v.* Allan, 23 D. 589.

[5] Laird *v.* Miln, 1833, 12 S. 54.

[6] See A. S. 7th March 1908, Part II. No. 27.

**Disposal of Question of Interim Interdict.**—If the respondent appears and makes objection to the granting of interim interdict, the Court may dispose of the question in various ways. (1) It may grant interim interdict without caution. This course is usual where the case for the complainer presents a very strong *prima facie* case of an apparent inversion of his rights or of the state of possession. (2) Interim interdict may be granted on caution in cases where the case for the complainer is *prima facie* weak, but interim interdict is necessary for the protection of his rights, and the balance of convenience is in favour of the interdict being granted.[1] (3) It may be refused without caution being found by the respondent in cases where the *prima facie* case is strongly against the complainer. (4) Interim interdict may be refused on caution by the respondent if the complainer shows a sufficient *prima facie* case, but the balance of convenience is against interdict being granted.[2] Or, finally, it may be withheld, in cases in which it otherwise would be granted, on caution by the respondent, or on an arrangement being made which is better adapted to secure the interests of parties in the meantime, such as the finding of caution by the respondent to make good all loss and damage occasioned by the operations complained of, with an undertaking to keep an accurate account of all goods made, sold, exported, etc., as the case may be.[3] Generally, it may be said that the considerations which induce the Court to grant interim interdict are those which determine the question of caution, since caution is a means of ensuring that the least possible injury shall be done to either party, and that the loss shall fall on that party who on the merits is found to have been in the wrong.[4]

**Subsequent Procedure.**—Except as regards the matter of interim interdict, the procedure in actions of interdict follows the usual course. The final judgment of the Sheriff either grants interdict *de plano* as craved, or declares the interdict already granted perpetual; or it sustains the defender's objections and refuses the interdict, recalling, when necessary, the interdict already granted. When the interim interdict is recalled, the complainer may be liable for any damage it may have occasioned.[5] Where the defender lodges

[1] Curtis *v.* Sandison, 1831, 10 S. 72.

[2] Johnstone's Trs. *v.* Dumfries Rd. Trs., 1867, 5 M. 1127.

[3] Macnee *v.* Black, 1855, 17 D. 837; Lindsay *v.* Robertson, 1867, 5 M. 864.

[4] *See* Mackay's Manual, 458 *et seq.*

[5] Glasgow City & Dist. Rly. Co. *v.* Glasgow Coal Exch., 1885, 12 R. 1287.

objections which are tantamount to his saying, "I do not admit having done the act complained of, but if I did do it I had as a matter of fact a perfect right to do so," and it is clear that no such right exists. interdict *de plano* ought not to be granted. Such a plea does not involve any inconsistency, and in view of the fact that interdict is a matter which may be followed by criminal proceedings, it should not be granted without evidence sufficient to establish the fact which the respondent denies. If the pursuer avers as a matter of fact that the defender did commit the act, interdict against a repetition of which is craved, on a particular day and in a specified manner, the proper course is to allow him a proof of his averments and the defender a conjunct probation, conjunct, that is, to the one fact which pursuer is allowed to prove.[1]

**Appeal against Interdict.**—An appeal against the judgment of the Sheriff-Substitute granting or refusing interim interdict may be taken to the Sheriff. An appeal against a final judgment of the Sheriff or Sheriff-Substitute may be taken to the Court of Session.[2] Where an appeal is taken to the Court of Session, it is not competent, while that appeal subsists, to crave the Court by note to recall the judgment of the Sheriff until the appeal is finally decided. The proper course is to move the Sheriff, under section 79 of the Court of Session Act of 1868, to suspend the operation of the interdict until the appeal is finally decided. Such an interlocutor, though it will be subject to appeal, is not an ordinary interlocutor in the cause but an independent interlocutor, written on a separate interlocutor sheet. Such a course is the proper one to adopt in cases where the interdict granted prevents the operation of a scheme of great public importance or utility, the prevention or stoppage of which even for a limited period may be attended with vital consequences.[3]

### (*b*) BREACH OF INTERDICT

The remedy given by an interdict is purely negative, and the decree cannot, like one *ad factum præstandum*, be enforced by imprisonment. If the defender fails to obtemper the decree of

[1] Warrand *v.* Watson, 1906,'8 F. 253, *per* Ld. Pres. Dunedin, *explaining* M'Leod *v.* Davidson, 1886, 14 R. 92.

[2] Act, ss. 27, 28.

[3] Trainer *v.* County Council of Renfrew, 1907, S.C. 1117, per Ld. Pres. Dunedin.

Court, whether of interim[1] or perpetual interdict, the pursuer's remedy is to prosecute for breach of interdict. This application is of a quasi-criminal character, and the precedure which follows partakes both of a civil and of a criminal form. The pursuer may, however, if he chooses to forego his penal remedy, present his application with merely civil conclusions, praying that defender may be found to have committed a breach of interdict, that matters may be ordered to be restored to their original condition, that the defender may be ordained to find caution not to repeat his breach,[2] and that he be ordered to pay pursuer a named sum of damages with expenses. It is, however, customary to combine the application with civil conclusions with one containing penal conclusions. In the latter the pursuer craves that the defender may be cited to appear personally in Court at a diet to be appointed by the Sheriff, and that he may be fined for contempt of Court and ordered to be imprisoned in the event of his failure to pay the fine and to find him liable in expenses. If the application contains penal conclusions the concurrence of the Procurator-Fiscal is necessary.[3] But though the application is made with the concurrence of the Procurator-Fiscal, it is not made on his authority or responsibility, and therefore warrant of apprehension ought not to be granted *de plano*. If, however, the defender disobey the citation, warrant may be granted for his apprehension. The defender need not necessarily be present when sentence is pronounced. But except perhaps in cases where he is merely found liable in expenses, or in a merely nominal penalty,[4] it is usual to summon the respondent to the bar. But as the respondent could not suspend a decree obtained against him for breach of interdict, such a decree is not inept because it has been pronounced in his absence. Breach of interdict is not a criminal proceeding, but one by which the Court protects its own authority from contempt, and therefore the rule which obtains in criminal proceedings does not apply.[5] The procedure which follows is similar to that in an ordinary action. Any objections on the merits may be stated by the defender or his agent, who is entitled to be present.

[1] Robertson *v.* M'Donald, 1829, 7 S. 272.

[2] *See* Gray *v.* Petrie, 1848, 10 D. 718.

[3] Northumberland *v.* Harris, 1832, 10 S. 366.

[4] Brown *v.* Thomson, 1882, 9 R. 1183. For procedure and form of interlocutor when respondent fails to appear, *see* Welsbach Incandescent Co. *v.* M'Mann, 1901, 4 F. 395.

[5] Stark's Trs. *v.* Duncan, 1906, 8 F. 429, *per* Ld. Pres. Dunedin.

The Procurator-Fiscal's attendance is not necessary. Such preliminary objections as may be stated are noted by the Clerk of Court, and are either sustained or repelled by the Sheriff in the usual way, or a proof of them is allowed, at the diet of which the defender need not personally be present. It is a wholly irrelevant objection that the decree for breach of which the respondent is charged was improperly obtained, and granted under circumstances where if the facts had been known the Court would have refused decree. Persons are not entitled to disobey an order of Court and then to claim to show that the Court ought not to have made the order.[1] If the defender's objections are repelled, either without or after a proof, he is then subjected to a judicial examination,[2] as in a criminal case, being first judicially cautioned. If the defender then denies the charge made against him of breach of interdict, the pursuer will be granted a proof of his averments and the defender a conjunct probation.[3] Answers are sometimes ordered and the proof taken summarily, but the better course is to have a record made up and closed in common form and a proof allowed, taken and recorded in the manner appropriate to ordinary civil actions.[4] At the proof, in which the defender may be examined as a witness for himself,[5] the pursuer must prove the breach of interdict complained of, great strictness being required in view of the seriousness of the consequences. Thus, where an interdict against drawing boats upon an island was granted, it was held that proof that defender had drawn his boat till it grounded in shallow water was insufficient to prove a breach of the interdict.[6] If eventually the defender is found guilty, judgment is given, the penalty being in the discretion of the Court. If, since the granting of the interdict, there has been a change of circumstances such as to disentitle the complainer from insisting in his right to enforce the decree, the Court will not necessarily punish the party interdicted for having committed a breach. Where, however, such circumstances emerge, the respondent's proper course is to apply for recall of the interdict.[7] The penalty

[1] Stark's Trs. *v.* Duncan, *sup.*

[2] Mackay *v.* Ross, 1853, 1 Irv. 288; Walker *v.* Junor, 1903, 5 F. 1035; Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

[3] *See* Warrand *v.* Watson, 1905, 8 F. 253.

[4] Henderson *v.* MacLellan, 1874, 1 R. 920.

[5] Miller *v.* Bain, 1879, 6 R. 1215.

[6] Menzies *v.* Macdonald, 1864, 2 M. 652.

[7] Lord Lovat *v.* Macdonell, 1868, 6 M. 330; Dudgeon *v.* Thomson, 1877, 4 R. (H.L.) 88.

may vary from a merely nominal fine in cases where, although there has been a breach, the Court is of opinion that it has not been committed wilfully,[1] to one of large amount (which is payable to the public prosecutor, and who may recover it by the method in use for civil decrees[2]), or of imprisonment for a specified time in the event of the defender's failure to pay the fine imposed. In aggravated cases the offender may be sentenced to imprisonment without the option of a fine.[3] A duplicate copy of the interlocutor signed by the Sheriff is a sufficient warrant for respondent's committal to prison.[4]

**Appeal against Sentence.**—The quasi-criminal nature of the proceedings is perhaps best shown in the decree which is pronounced when the Sheriff is satisfied that a breach has been committed, and that its commission, as a contempt of Court, ought to be punished. The Sheriff, as in a criminal case, first finds as a matter of fact that a breach has been committed and then imposes a fine, or in default of its payment a term of imprisonment, on the defender. But notwithstanding its criminal form the decree is essentially a finding in fact in a civil cause, the parties to which are the pursuer and defender. That finding in fact is in essence a finding in favour of the pursuer, with this distinction, as compared with the finding in an ordinary civil cause, that the consequences to the defender are not solely civil, but partake of a criminal character. It is of course quite true that the imposition of a fine or a sentence of imprisonment is the direct result of the defender's failure to obtemper a decree of the Court, and that the Court is entitled to punish any one who disobeys such an order. But the order itself is not one which the Court, as such, has any interest to enforce, nor is breach of the order such a contempt as the Court has any interest to punish. The pursuer, as the pursuer in an ordinary civil action, invokes the aid of the Court to afford him redress against the defender in respect of a purely civil injury. The offence cannot be classed in the category of criminal actions, and to describe it as a contempt of Court is to make use of a legal fiction comparable to that once adopted with reference to horning, where a debtor ordered to pay

[1] Fraser's Trs. *v.* Cran, 1879, 6 R. 451.

[2] Beattie *v.* Rodger, 1835, 14 S. 6.

[3] Boswell's Trs. *v.* Pearson, 1886, 24 S.L.R. 32; Mackenzie *v.* Coulthart, 1889, 16 R. 1127.

[4] Macleod's Trs. *v.* Macpherson, 1883, 10 R. 792.

his creditor's debts, and failing to do so was regarded as being a traitor to his Sovereign. The decree therefore, notwithstanding that its sanction is criminal in character, is essentially a decree in an ordinary civil action. The practice therefore of regarding such decrees as civil decrees, capable, like any other such decree, of being appealed, would appear to have logical justification, though it does not appear to derive any sanction from authority. Since the judgment of the Sheriff-Substitute holding the defender guilty of a breach of the interdict is one which finally disposes of the cause, it may, it would appear, be competently appealed to the Sheriff. Whether an appeal is equally competent to the Court of Session is not, or rather perhaps but for a decision to be mentioned, would not be, clear. The Act of 1907 provides that appeal to the Court of Session shall not be competent unless the value of the cause exceeds £50. It further provides that in actions *ad factum præstandum* the value of the cause shall be deemed to exceed £50 unless the Sheriff shall determine otherwise. And in another section it provides that in a cause the Sheriff must determine, in such way as he deems proper, the value of the cause for the purposes of the Act, his determination of such value being final as regards the competency of the action on the ground of value, though not otherwise. An application for breach of interdict is not a summary cause whatever its value may be, but an ordinary action initiated and carried through in the ordinary way; and as it is one in which the value cannot be disclosed, the Sheriff must, under the provisions of section 9, determine its value for the purposes of the Act, one of these "purposes" being the competency of appealing to the Court of Session. Now it has been decided that a decree for payment of money, under which description a fine is presumably included, is not a decree *ad factum præstandum*. *A fortiori* a sentence of imprisonment cannot fall under that category. It would seem, therefore, that in actions of breach of interdict the Sheriff must determine the value of the cause, but except as regards the competency of the action (with regard to which no question arises) his decision is not final. If therefore the Sheriff-Substitute, or the Sheriff on appeal, decide that the value of the cause exceeds £50, as to which in an action involving penal consequences there could hardly, it would seem, be much doubt, then an appeal to the Court of Session is competent.

The whole question arose sharply in a case which was decided prior to the passing of the Act of 1907, but in which the competency of the appeal on the ground of value was either assumed or ignored. In that case[1] the Sheriff-Substitute convicted a respondent and fined him £5, or failing payment ordered him to be imprisoned for ten days. The case was somewhat complicated by the absence of certain technicalities, which may, however, be ignored. The Sheriff on appeal entertained no doubt that an appeal to him against the judgment of the Sheriff-Substitute was competent, and he adhered to the Sheriff-Substitute's findings, and of new imposed the same sentence. The respondent then appealed to the Court of Session. The pursuer stated certain preliminary objections to the competency of the appeal, but no question whatever was raised as to the competency of the appeal on the ground of value. But it must be remembered that the difference in this respect between the former Acts and that of 1907 is that the latter has simply raised the privative jurisdiction of the Sheriff from £25 to £50. The case was decided on three grounds, the first of which had reference to the technical objections already referred to, but which the Court brushed aside. The remaining grounds were that an action for breach of interdict was competent in the Sheriff Court, which re-established a fact which could hardly have been doubtful, and that it was competent to fine the respondent in his absence, a decision which was at variance, not of course with the authorities, but with the principles which many, if not most people, had wrongly deduced from them. But if that decision was competently appealable under the statutes in force prior to 1907, as to which it must of course be accepted that the answer is affirmative, there cannot possibly be any reason, at least none that is apparent, why a similar decision should not be competently appealable under the Statute of 1907.

## VI. Law-Burrows

This is a form of action by which a person having reason to fear bodily harm from another, may have that other ordained to find caution that he will no longer trouble or molest him. The procedure is regulated by the Civil Imprisonment Act of 1882, which greatly modified and improved that previously in use. It is a summary

[1] Stark's Trs. *v.* Duncan, 1906, 8 F. 429.

application in the sense of section 50 of the Act of 1907. The initial writ sets forth the facts and the grounds of pursuer's apprehensions, and craves that the defender may be ordained to find caution for a specified sum, or for such sum as the Sheriff may think right, not to molest the pursuer; and further, that if he fail to find such caution, that he be incarcerated for a period not exceeding six months, or till otherwise liberated in due course of law. The petition on presentation is ordered to be served, and the Sheriff grants warrant to cite witnesses for a diet named. At the diet appointed, or at an adjourned diet, the application is disposed of in the manner provided by the Summary Jurisdiction Acts,[1] evidence being led for both parties in a summary manner without written pleadings or a record of the evidence. The parties are competent witnesses, and the crave may be granted on the sworn testimony of one credible witness, even though such witness be a party. The Sheriff, if satisfied of the danger, ordains the defender to find caution, or grant a bond within a stated time, that he will not molest the pursuer, and failing such caution or bond orders the defender to be imprisoned for such period, not exceeding six months, as he may consider expedient. Expenses may be awarded against either party, but there is no power to imprison the defender for non-payment of expenses in the event of their being awarded against him, and they must therefore be recovered as a civil debt. When in prison, the applicant is not bound to aliment the defender, who is treated as if he had been incarcerated for contempt of Court.[2] If the warrant has been improperly obtained, it may be reviewed by the Supreme Court by note of suspension or of suspension and liberation, according as the defender has or has not been imprisoned,[3] the note being passed (so as to try the question) on such caution as the Court may think fit. If the defender offers to prove that the application was made maliciously and without probable cause, the Court may dispense with caution.[4] It would appear that the warrant will not be set aside unless the defender can prove both malice and want of probable cause.[5] If, however, the defender does prove that the pursuer has acted maliciously and without probable cause, he will be entitled to damages. There

[1] Summary Procedure Act, 1864, and Summary Jurisdiction (Scotland) Act, 1881. (Summary Jurisdiction Act 1909).

[2] Civil Imprisonment Act, 1882, s. 6.

[3] Smith *v.* Baird, 1799, M. 8043.

[4] Gadois *v.* Baird, 1856, 28 Jur. 682.

[5] Brock *v.* Rankine, 1874, 1 R. 991.

is no right of appeal against the judgment of the Sheriff refusing the application.

## VII. Suspension


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Suspension is the process whereby the injury of rights is prevented, as distinguished from the remedies where such injury has been accomplished, its object being to stay or arrest some act or proceeding complained of, and to retain matters in their present position until the rights of parties can be determined by a final judgment. It is competent in the Sheriff Court only as a means of staying execution of diligence by the threatened or unwarrantable use of which important rights may be injured. It is not, however, competent in the Sheriff Court, as it is in the Court of Session when combined with the process of interdict, as a means of putting a stop to a proceeding threatened or begun, but not completed (other than diligence), which is injurious to a right, and therefore cannot be used to prevent the performance, continuance, or repetition of such an act, which can only competently be obtained by an action of interdict. Suspensions of all decrees *in foro* of the Inferior Courts were formerly competent only in the Supreme Court, and suspension as a stay of diligence belongs still to the exclusive jurisdiction of that Court, except in the case of a charge or threatened charge for a sum under £50, which is now competent in the Sheriff Court. But the Sheriff has still no jurisdiction to entertain a suspension of a charge *ad factum præstandum*, or of a warrant of imprisonment. And while interdict for the purpose of regulating possession or preventing interference with it is a remedy appropriate to the Sheriff Court, it is incompetent to use that process in the Sheriff Court to effect objects for which an action of suspension and interdict in the Court of Session is still the only competent form. Suspension in the Sheriff Court is competent where decree or a document exists on which a charge may follow: where the charge

has not yet been given the procedure is by suspension of a threatened charge, and whether the charge be actually *de facto* threatened or not, the averment in the application for suspension must formally aver that it is.

The process of suspension is, and has always been, competent only to a very limited extent in the Sheriff Court. The Act of 1907 has, however, in three material particulars considerably enlarged the extent to which such actions are competent. That Act provides that the jurisdiction of the Sheriff shall extend to and include suspension of charges or threatened charges upon (1) the decrees of Court granted by the Sheriff, or (2) decrees of registration proceeding upon bonds, bills, contracts, or other obligations registered in the books of the Sheriff Court, the books of Council and Session, or any others competent, where the debt, exclusive of interest and expenses, does not exceed £50.[1] Under the provisions of the earlier Statutes,[2] suspension was competent only with regard to charges which had actually been given upon decrees of registration for payment of a sum of money not exceeding £25, exclusive of interest and expenses. It will therefore be seen that the alterations on the law affected by the Act are (1) that suspension is now competent not only upon charges which have actually been given, but also upon those which are merely threatened; (2) that the charges which may be suspended include those given or threatened upon decrees of the Sheriff Court as well as upon decrees of registration; and (3) that the limitation in the amount of the debt in respect of which suspension is now competent has been raised from £25 to £50.

Some difficulty seems to be created by the terms of the rules which are applicable to the jurisdiction thus conferred, but that difficulty seems to disappear when it is remembered that the section of the Act is that which confers the jurisdiction upon the Sheriff, while the rules merely make provision by which such jurisdiction may in practice be carried out or given effect to. The chief difficulty arises from the fact that the rules applicable to the section of the Act take no notice whatever of the suspension of threatened charges, but make provision only with regard to charges which have actually been made. A minor difficulty (which perhaps is hardly entitled to

[1] Act, s. 5 (5).

[2] Act of 1838, s. 19; A. S. 1839, ss. 116–118.

that name) is created by the fact that the rule[1] provides that suspension shall be competent only upon caution, while the section of the Act is silent upon the point. In regard to the first difficulty, it is obvious that the section of the Act which confers the jurisdiction must rule the matter, and that the omission to make provision in the case of a threatened charge has been made *per incuriam*, and may therefore be supplied by a subsequent Act of Sederunt. Or it may be, which perhaps is the more likely, that the rule contemplates both threatened charges and those which have been made, with the intention that the procedure provided shall be applicable equally to both kinds of charge. In the absence of authoritative decision to the contrary, it may perhaps be assumed that the latter construction of the rule is the right one. With regard to the second difficulty, it seems equally obvious that once the jurisdiction is conferred the provision of the rule that advantage of the jurisdiction so conferred may be taken only on condition that caution is found, is merely administrative and not substantive. It may therefore perhaps be assumed that suspension of a charge, whether threatened or given, is competent only upon caution. In the Court of Session this rule obtains, and indeed in most cases of suspension in that Court consignation is requisite; in any event, the suspender must always offer caution, consign the sum charged for, or disclose such exceptional circumstances as warrant the "note" to try the cause being passed without caution or consignation.

As has been seen, the suspension of a charge upon a decree *in foro* pronounced in the Sheriff Court is now for the first time made competent, though where the decree is for a sum exceeding £50, suspension is still only competent in the Court of Session. In the Court of Session the suspension of decrees is only competent with reference to (1) decrees *in foro* pronounced in the Sheriff Court, and (2) decrees in absence obtained in the Court of Session. In other words, the Court of Session, as the Supreme Court of the kingdom, possesses jurisdiction to suspend all decrees pronounced *in foro* in the Inferior Courts, but it has no power to suspend its own decrees, unless these have been pronounced in the absence of the defender, that is, unless they are not decrees *in foro*. If then the provisions of the section of the Act are to be construed according to what appears to be their plain meaning and intention

[1] Act, Rule 123.

(and in the absence of authoritative decision to the contrary there appears to be justification), that the Sheriff has jurisdiction to suspend his own decrees *in foro*, it will at once be seen that the Act introduces into Sheriff Court procedure a far-reaching innovation, and one which is pregnant with unlimited possibilities. It has been suggested that the intention of this seemingly wide power of suspension is no more than to avoid the cost of resorting to the Court of Session merely for the purpose of rectifying some technical error in the judgment of the Sheriff or in the charge following upon it.[1] It must be confessed, in view of the fact that to permit to the Sheriff with relation to his judgments a power which is not possessed by the Supreme Court with relation to the judgments pronounced by it, is wholly anomalous and contrary to every preconceived notion, that the suggestion carries with it an air of extreme probability. But the provisions of the Act are in no way qualified in their terms, and as the Court of Session alone can authoritatively decide what construction can competently be placed upon the phraseology of the section, it must be left to the Judges of that august tribunal to decide whether the suggestion embodies the intentions of the Legislature or not. Meantime it would not appear to be wholly in accordance with the dictates of sound construction to assume that the words of the section are so wholly contrary to and subversive, of previously established practice, as at first sight they seem to imply. If the phraseology of the section means what it says, then the Sheriff possesses power, by an indirect and roundabout method, to review his own judgments pronounced after careful consideration and in accordance with what he conceives to be strict justice and impartiality, a power which is not, and never has been, possessed by any tribunal, inferior or superior, in this country. But, as will be seen, the application must be made to the Court of the complainer's domicile. As that Court, however, is not necessarily the Court which pronounced the decree the charge on which is sought to be suspended, the Act, if its provisions be construed literally, confers upon the Sheriff-Substitute of one jurisdiction the power to review indirectly the judgment of another, a construction which appears wholly to outrage probability.

**Procedure.**—The application must be made to the Sheriff Court of the domicile of the person charged. Defenders are, however,

[1] Sheriff Fyfe, "Code," p. 29.

amenable to the jurisdiction of the Sheriff on various grounds besides those of domicile. Thus, where there are several defenders, the action may be brought in the jurisdiction where one of them resides, or has resided for at least forty days prior to the raising of the action. And a defender who carries on business within the Sheriffdom may, if cited personally or at such place of business, be made amenable to the jurisdiction in which his business is situated. Other examples will be found in the chapter dealing with the subject of Jurisdiction. It will therefore be apparent that the Court which grants the decree, the charge on which is sought to be reduced, is not necessarily the Court to which the application for suspension is made. Except, however, in four cases there does not appear to be any difficulty in connection with the provision that a suspension must be brought in the Court of the complainer's domicile. But the defender may be a person not otherwise subject to the jurisdiction of the Scots Courts, who, if a ship or vessel of which he is owner or part owner or master, or goods, debts, money or other moveable property belonging to him be arrested, becomes amenable to the jurisdiction of the Sheriff in which such ship, goods, etc., is situated.[1] If such a person desire to suspend a decree of Court on which he is charged, he must bring the action in the Sheriff Court of his domicile. Obviously, as he is not, but for the provisions of the section, amenable to the jurisdiction of the Scots Courts, he cannot *ex hypothesi* be possessed of a domicile within Scotland, much less within the Sheriffdom. He cannot, therefore, it would appear, take advantage of the provisions of the Act, and must necessarily present his application for suspension to the Supreme Court. Again, where the defender is not amenable to the jurisdiction of the Scots Courts, but has been sued *ex reconventione*, or has prorogated the jurisdiction, or has committed a delict, in respect of which the decree against him has been pronounced, within the jurisdiction of the Sheriff, an application for suspension of a charge upon the decree pronounced against him must also apparently be made to the Supreme Court. It seems, however, hardly consonant with the principles of equity that a person should be made subservient to the jurisdiction of the Sheriff as a defender in respect of the arrestment of a ship or of goods belonging to him, or of a delict which he is alleged to have committed, and yet be denied the advantages which all other defenders possess. Of course, if he has

[1] Act, s. 6 (c).

prorogated the jurisdiction or is sued *ex reconventione*, there can be no injustice in denying to him privileges which but for his voluntary action he would not even have desired or required. But perhaps the equity of the matter will emerge when it is remembered that in all such cases the defender is a person who, but for certain circumstances, would not be amenable to the jurisdiction of the Scots Courts, and that therefore it is only in accordance with the ordinary principles of justice regulating the procedure in the Courts that such persons should be denied privileges only intended for Scots subjects, and that they should be compelled to seek redress only from the Supreme Court.

**Sist of Diligence.**—Upon sufficient caution being found in the hands of the Sheriff-Clerk for the sum charged for, together with interest and expenses, and of a sum fixed by the Sheriff in respect of the expenses to be incurred in the suspension, the Sheriff may sist diligence, order intimation of the application and answers, and thereafter proceed to dispose of the cause in a summary manner.[1] Consignation of the amount will of course be sufficient. The sufficiency of the caution offered is apparently within the discretion of the Sheriff, as is the question whether a sist of diligence should be granted or not. The words of the rule would seem to imply that it is also within the discretion of the Sheriff whether intimation and answers should be ordered or not, or whether the application should be proceeded with or not, in so far as the provision with reference to these matters is permissive and not obligatory. It would not, however, appear to be competent for the Sheriff to refuse to order intimation and answers, more especially when it is remembered that the application may substantially be one to the Sheriff to review his own judgment on the merits. And if it be incompetent for the Sheriff, except on the ground of the insufficiency of the caution offered, to refuse to order intimation and answers, it would appear to be equally incompetent to refuse a sist of diligence. Intimation of the sist should be made forthwith to the charger, or if he live out of Scotland to his mandatary or other person at whose instance the diligence is being carried out, since, although such intimation may not be complete legal intimation, it will be such as to make it very unsafe for the holder of the decree to proceed further. Such an intimation prevents the charger proceeding to execute poinding or

[1] Act, Rule 124.

imprisonment, or to carry out a decree of removing,[1] but not to execute arrestment or inhibition.[2] Where diligence is proceeded with, notwithstanding a sist, a contempt of Court is committed.[3] At the diet fixed by the Sheriff, or at any subsequent diet, the parties are heard, but no record of the evidence (if any) is taken unless the Sheriff so orders. The Sheriff then disposes summarily of the application, giving his judgment in writing.[4] If objections be taken to the competency or regularity of the proceedings, the judgment of the Sheriff-Substitute upon such objections may be appealed to the Sheriff, but his judgment is final. There is no appeal from the Sheriff-Substitute except with regard to objections to the competency or regularity of the proceedings.

[1] Keltie *v.* Wilson, 1828, 7 S. 208; Tait *v.* Gordon, 1828, 6 S. 1056.
[2] Miller *v.* Wilson, 1749, M. 15148.
[3] Tait *v.* Gordon, *sup.*
[4] Act, s. 50; *see also* Rule 82.

# CHAPTER XXVIII

## ACTIONS OF DECLARATOR, DIVISION, MULTIPLEPOINDING, AND PROVING OF THE TENOR

### I. Actions of Declarator


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**Nature of Action.**—Actions of declarator are those by which are declared a right which has been questioned, or a fact or facts on which such right depends. The object of such actions is to obtain a decree of a competent Court declaring that pursuer has, and that the defender has not, a certain right. But declaratory actions do not exist in order to establish truisms,[1] nor will the Court grant a declarator of an abstract fact.[2] Before the Court can pronounce a judgment in an action of declarator, there must be an actual or a threatened violation of a right which the pursuer has an immediate practical interest to establish, and even where such a right exists the Court will not declare it unless it is disputed and the defender has an equal interest with the pursuer to have it declared. Nor will the Court declare a right by anticipation before the facts on which it depends emerge,[3] as, for example, where the pursuer seeks declarator that in the event of his dying without issue he will be entitled to test upon certain sums.[4] But the stringency of the former rule that no decision of a purely hypothetical question could be pronounced before the necessity for its decision arose, has of late years been considerably modified, and it may now be said, in accordance with a

[1] Mags. of Edin. *v.* Warrender, 1863, 1 M. 887, *per* Ld. Neaves.

[2] Lyle *v.* Balfour, 1830, 9 S. 22, *per* Ld. J.-C. Boyle.

[3] E. of Galloway *v.* Garlies, 1838, 16 S. 1213.

[4] Harvey *v.* Harvey's Trs., 1860, 22 D. 1310; Fleming *v.* M'Lagan, 1879, 6 R. 589.

weighty *dictum*, that an apprehended dispute or question regarding the validity or priority of almost any legal right may be anticipated and adjudicated upon in a declarator before it actually arises, provided all parties interested, or who may be interested, can be, and in fact are, duly called.[1] Practically, then, any question of law to which a suitor has an interest to obtain an answer, may be made the subject of a declarator, provided only that a proper contradictor can be got.[2] A declarator of the interpretation of a Statute is competent in the Court of Session, and is probably equally competent in the Sheriff Court for any value which a decision in that Court might possess.[3] It is a general rule with regard to actions of declarator that whenever a right upon which an action is to be founded is not clear as to its existence or extent, a declarator is proper, and in certain cases necessary, before an action to enforce the right can proceed. Therefore in such cases an action containing declaratory conclusions should have combined with them such other conclusions, petitive or possessory, as may be required; reductive conclusions are competent only in the Court of Session.

**Actions Competent.**—Prior to the Act of 1907, actions of declarator were competent in the Sheriff Court only to a limited extent. They were competent in questions of heritable right or title where the value of the subject in dispute did not exceed the sum of £50 by the year or £1000 in all, and in questions relating to the property in, or right of succession to, moveables where the value of the subject in dispute did not exceed £1000. By the Act of 1907 the jurisdiction is extended to all actions of declarator, with the exception of those of marriage or nullity of marriage, and to actions the main or direct object of which is to determine the personal status of individuals.[4] But all actions relating to questions of heritable right or title, or to division or division and sale of common property, if raised in the Sheriff Court, must be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated, all parties

[1] *Per* Ld. Young in Fleming *v.* M'Lagan, *sup.*

[2] Chaplin's Trs. *v.* Hoile, 1890, 18 R. 27; Falconar-Stewart *v.* Wilkies, 1892, 29 S.L.R. 534; Callender's Cable Co. *v.* Glasgow Corpn., 1900, 2 F. 397; *see* Millar *v.* Millar's Trs., 1896, 4 S.L.T. 190 (O.H.); Stewart & Co. *v.* Sillars, 1906, 13 S.L.T. 800 (O.H.); Davidson *v.* Davidson, 1906, 14 S.L.T. 337 (O.H.).

[3] Sullivan *v.* Close, 1898, 6 S.L.T. 1 (O.H).

[4] Act, s. 5 (1).

against whom such an action is brought being subject to that jurisdiction.[1] And it is further provided that in actions relating to questions of heritable right or title where the value of the subjects exceeds £50 yearly or £1000 in all; in those relating to the right of succession in moveables where the value of the subject in dispute exceeds £1000; or in those relating to division of commonty or division or division and sale of common property where the value of the subject in dispute exceeds £50 by the year or £1000 in all; it is competent for either party at the closing of the record, or within six days thereafter, to require the cause to be remitted to the Court of Session.[1] The Act therefore makes competent in the Sheriff Court declarators relating to heritable right or title which formerly were competent only in the Supreme Court, but it provides that such actions need not be followed in the Sheriff Court beyond their initial stages unless the parties are agreeable to such a course. All other actions of declarator, with, of course, the exception of the two classes already referred to, may be competently raised in the Sheriff Court, and if so raised are subject to the ordinary rules of procedure. Under Section 5 of the Conveyancing Act of 1874, which provides what may be described as a special code for casualties becoming due by corporations or bodies of trustees (two classes of persons, whom under the old law superiors were not bound to enter except upon special terms, and who were thus in an exceptional position), actions of declarator and for payment of casualty are now competent in the Sheriff Court.[2]

**Actions Incompetent in Sheriff Court.**—Up till the passing of the Act of 1907 the Court of Session had exclusive jurisdiction in actions relating to the right of status, which, owing to the fact that prior to the Reformation they were confined to the Consistorial Courts, are still sometimes called consistorial actions. Under the category of consistorial causes are included actions of declarator of marriage and of nullity of marriage, of legitimation and bastardy, and actions of divorce, adherence, putting to silence, and of separation *a mensa et thoro*. Under the previous law the Sheriff had, however, power to entertain actions as to rights incident to or depending upon the right of status where that right itself was not

[1] Act, sec. 5 (*proviso*).

[2] Fife Coal Co. *v.* Bernard's Trs., 1907, S.C. 494; Govs. of Trades Maiden Hospital *v.* Mackersey, 1907, S.C. 73; Motherwell *v.* Manwell, 1903, 5 F. 619.

in question, or even in cases where it was, if the decision of the cause did not necessarily involve the decision of the question of status, as where, for example, a question of the marriage of one of the parties was raised but the judgment did not involve the decision of that question,[1] or where proof of an irregular marriage was merely incidental to the ascertainment of a pauper's settlement.[2] And actions for aliment by a wife against her husband were competent in the Sheriff Court if as a matter of fact the wife was living separate from her husband.[3] But if the spouses were living separate, not as the result of a contract of separation or legally, the power of the Sheriff was limited to granting an interim award till the rights of the parties might be determined in an action in the Court of Session.[4] And an attempt by the Sheriff, by granting successive awards of interim aliment, to convert the aliment from interim to permanent, was equally incompetent.[5] When the fact of the marriage was denied and an action of declarator was necessary to establish it, an action even for interim aliment was incompetent in the Sheriff Court.[6]

The actions which are, by the provisions of the Act of 1907, still incompetent in the Sheriff Court, are those of—(1) declarator of marriage, (2) declarator of nullity of marriage, (3) actions the direct or main object of which is to determine the status of individuals. The first two classes, which include actions of divorce, have always been excluded from the jurisdiction of the Sheriff, and the provisions of the Act with regard to them are therefore merely declaratory of the existing law. The terminology of the section dealing with the third class need not occasion any difficulty, since from what has been said it will be seen that it also is declaratory of the existing law. All consistorial actions, therefore, with the exception of actions of separation and aliment, and those where consistorial questions are raised incidentally, are still incompetent in the Sheriff Court.

**Procedure.**—The procedure in actions of declarator follows the ordinary course save in one important particular. If the action relates to a question of heritable right and title, to the right of succession in moveables, or to the division of common property, and

[1] Wright *v.* Sharp, 1880, 7 R. 460.

[2] Macdonald *v.* Mackenzie, 1891, 18 R. 502.

[3] Hay *v.* Hay, 1882, 9 R. 667; Rennie *v.* Rennie, 1863, 1 M. 389.

[4] M'Donald *v.* M'Donald, 1875, 2 R. 707.

[5] Smith *v.* Smith, 1874, 1 R. 1011, *per* L. Pres. Inglis.

[6] Benson *v.* Benson, 1854, 16 D. 555.

it is over the respective values already referred to, it may on the motion of either party at the closing of the record be remitted for trial in the Court of Session. If the value of the cause is not disclosed the Sheriff, in such way as he may think expedient, inquires into and determines its value. His determination of the value of the cause (except as regards the competency of the action on the ground of value, in regard to which few questions can arise in actions of declarator) may be appealed to the Sheriff, and if the value so determined exceeds £50, to the Court of Session, with the leave of the Sheriff-Substitute or Sheriff.[1]

## II. Actions of Division


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These actions were, by the Act of 1877, made competent in the Sheriff Court where the value of the subject in dispute, that is, the common property to be divided, did not exceed £50 by the year or £1000 in all. Such actions are now competent in the Sheriff Court, whatever be the value of the subject in dispute, to the same extent as they are in the Court of Session. If raised in the Sheriff Court they must be raised in the Court of the jurisdiction and district where the property forming the subject in dispute is situated, all parties against whom such actions are brought being amenable to that jurisdiction. If the property lies partly within two jurisdictions, there was under the Act of 1877, and there still is, apparently no power in either the one or the other to entertain the action. Where the value of the subject in dispute exceeds £50 by the year or £1000 in all, either, or where there are more defenders than one, presumably any, party to the action may, at the closing of the record, or within six days thereafter, require the cause to be remitted for trial to the Court of Session.

**Division of Commonty.**—A common or commonty is a piece of ground belonging in property to one or more persons, and in general burdened with sundry inferior rights of servitude, such as pasturage, feal and divot, and the like, in which last respect a

[1] Act, ss. 9, 28.

commonty differs from common property held *pro indiviso*. The Act of 1695, c. 38, which must now be read and construed as if it conferred jurisdiction upon the Sheriff Court in the same manner as upon the Court of Session,[1] makes all commonties, except those belonging to the King and Royal Burghs,[2] divisible at the instance of any one having an interest. The Statute empowers the Court to discuss the relevancy, to grant commission for perambulating and taking all necessary proof, to determine the rights and interests of the parties, and to divide the common amongst the parties concerned. It is also declared that the interest of the heritors having right to the common shall be estimated according to the valuation of their respective lands and properties, and that the portion of the common adjacent to the property of each heritor be adjudged to him. The Court has power also to divide the mosses in the common; or in case they cannot be conveniently divided, to determine that they shall remain common with free ish and entry, whether they be divided or not. It is not a commonty within the meaning of the Statute if there be only one proprietor burdened with rights of servitude competent to other heritors[3]; but if there be two proprietors the statutory division may be made, the conveyance by a sole proprietor of a small portion of the lands proposed to be divided, made even *pendente processu* and as a device to evade the statutory provisions, being sufficient to warrant the Court in proceeding with the division. A right of servitude is not a sufficient title,[4] since a servitude holder has no right to any share of the divided property.[4] In the action all parties having interests, whether of common property or of servitude, must be called, but tenants need not be cited.

*Procedure.*—The procedure in the Court of Session is regulated by the Act of Sederunt of 18th June 1852, and its provisions, so far as applicable to Sheriff Court procedure, should be followed. The crave should contain conclusions for—(1) an order on the defenders to produce their titles; (2) a declarator that the common ought to be divided among the pursuer and defenders according to their respective rights and interests; (3) a division to be made, and

[1] Act, s. 5 (3).

[2] *See* Hunter *v.* Mailler, 1854, 16 D. 641; Sandilands, 19th Jan. 1809, F.C.

[3] Stewart *v.* Feuars of Tillicoultry, 1740, M. 2469.

[4] Laurie *v.* D. of Hamilton, 1771, M. App. Commonty, No. 1; Gordon *v.* Grant & Byres, 1850, 13 D. 1.

a direction that the divisions falling to each proprietor may be marked off; and (4) expenses to be allocated among the parties. The petition is served in the ordinary way, and parties who intend to appear must lodge notices of appearance. The condescendence must set forth, in reference to a plan or sketch to be produced along with it, the description of the boundaries of the common, according to natural or other objects, and the nature and extent of the right and interest the pursuer claims in the commonty, his titles, and the claim he proposes to advance, which claim may be subject to any alteration which the evidence and the pleas may render necessary. It should also state the value of the commonty, and if such value be not disclosed the Sheriff before whom the cause depends may determine the value in such way as he deems expedient. The parties who appear must lodge defences setting forth the nature and extent of the interests they mean to advance in the process; the extent of the boundaries of the common, if they dispute those stated by the pursuer; the lands if any within the pursuer's boundaries which they claim as private property and as not forming part of the common, and their titles and claims. Against any defenders who fail to do so, as well as against those who fail to enter appearance, an order will be pronounced appointing their production. The record is then made up and closed, though if there be no dispute between the parties as to the division or as to the extent of their respective interests and claims, a record seems unnecessary. The Sheriff then considers the defences with reference to whether any questions of law ought to be determined before proof, or to what points proof should in the first instance be directed, or whether there are any separate and distinct points to be tried before the general boundaries are remitted to proof, and if so between what parties. The proof is almost invariably by remit to a qualified surveyor or other person of skill to examine the common and prepare a scheme of division, with relative plan.[1] If there be no objections to the report, decree of division is pronounced in accordance with its terms. If, however, parties do not acquiesce in the scheme of division, objections and answers are ordered within a stated time. After these have been considered and disposed of, a remit is made to the surveyor to prepare a final scheme of division,

[1] Bruce *v.* Bain, 1883, 11 R. 192. The various rules by which division is effected will be found in Rankine on Land Ownership, 496 *et seq.*

unless the parties agree on one or are able to adjust the terms of a final interlocutor. The decree has the effect of a conveyance by all the joint proprietors, with assignation of writs, and extract of it may be recorded in the Register of Sasines in terms of section 35 of the Conveyancing Act of 1874.

**Action of Division.**—This action is competent to one of several joint proprietors *pro indiviso*,[1] who desires to have the joint property divided and his share allocated to him. The procedure in the Court of Session is regulated by the same Act of Sederunt as applies to divisions of commonty, and in the Sheriff Court the procedure is similiar to that adopted for the latter action. The essential conclusions of the action are a crave—(1) for a declarator of the necessity for division and of its effect; (2) that the division may be effected and marked out or defined; (3) that the defenders should be ordained to execute all deeds necessary to complete the titles to the respective portions; and (4) or allocation of expenses.

*Procedure.*—The subsequent procedure is in all respects similar to that in the action of division of commonty, and extract of the decree may be registered in the same way and to the like effect as in that action.

**Division and Sale.**—Owing to the fact that from various causes it is difficult to divide joint property held *pro indiviso* equitably or without entailing serious loss, the action of division, just considered, is almost always combined with a conclusion for sale. Such an action is known as division and sale, and is in every respect identical with the action for simple division, except that it contains a conclusion that the subjects should be sold and the price divided, and that if the defenders appear and object to that course, proof is led to show the expediency or want of expediency of a sale, that is, that from the nature of the property it either cannot be divided at all, or, if divided, that its division will result in serious loss to the defenders. It is usual to appoint some person to draw up and revise the articles of roup, and to appoint the sale to be carried out at his sight. The interlocutor authorising the sale should provide for reasonable notice by advertisement or otherwise; and a clause authorising any one of the parties to the action to purchase the property is frequently, and indeed usually, inserted.

[1] Kennedy *v.* Maltmen of Glasgow, 1885, 12 R. 1026.

## III. Action of Multiplepoinding.


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**Nature of Action.**—The action is that by which the claims of two or more competitors to the same property or fund in the hands of a third party are determined. The subject in dispute, which may consist of property of any kind, heritable or moveable, is, from the fact that it usually consists of money, called the fund *in medio*, and the pursuer of the action, who is always the holder of the fund,[1] is called the raiser. If the action be raised by him, either because he has a claim upon the fund, or because he desires that the competing claims should be judicially determined and himself exonerated from liability with reference to the fund, he is called the real raiser. But the action may be raised in his name without his consent and even adverse to his wish by any of the competing claimants, and if so raised the holder of the fund is called the nominal raiser, the claimant in that case becoming the real raiser. Every person interested in, though not originally a party to, the action may, in the course of the proceedings, produce an interest in the fund *in medio* and plead the grounds on which he conceives himself to be entitled to preference. The action thus becomes a process of competition between the various claimants to the fund, the holder of which, having actually or nominally brought it into Court, retires from the contest (unless he himself be a claimant) and leaves the determination of the rights of the various parties to the decision of the Court.

**Competency of Action.**—As the foundation of the action is the existence of two or more adverse claimants to the same fund, it is a general rule that it is incompetent unless there is double distress, by which double diligence was originally meant, but which now means conflicting claims made or capable of being made against

[1] Kelland *v.* Douglas, 1863, 2 M. 150.

the fund.[1] Conflicting interests, which may eventually emerge into claims, are sufficient, even though the claims in respect of them have not been put forward. But there must be a true case of double claims to one fund, not a mere ostensible case got up to try a question of debt or obligation between two individuals, the proper mode of trying which is a direct action.[2] The action is competent at the instance of trustees, executors, or other holders of a trust fund who desire to obtain judicial exoneration, either because the trust funds are the subject of conflicting claims, or because they are unable, without judicial authority, to decide how such funds should be distributed, even although they have not been made the subject of competing claims. In such cases the trustees or other holders of the fund do not require to allege double distress. It may therefore be said that, broadly, the action is competent (1) where there is double distress, and (2) where trustees or other holders of a fund desire judicial exoneration.

**Double Distress.**—It is sometimes a matter of no small difficulty to determine precisely what constitutes double distress, but a reference to the more recent decisions will probably be the best method of elucidating the meaning of the expression.

*Cases in which held no Double Distress.*—The broad general rule in determining the competency of an action of multiplepoinding is that to make such an action competent there must at least be a fund in neutral custody, a dispute as to the persons entitled to that fund, competing claims made with regard to it, and in general a demand on the holder by one or more of the disputants. The claims which are said to be competing must not be mere random claims, but real and intelligible claims upon a fund *in medio*, set forth upon grounds which may or may not be well founded in law, but which are at least stated with sufficient precision to show that there is in truth a double claim upon one fund maintained by persons having hostile interests.[3] There must therefore be an actual fund in the hands of the raiser, and so capable of being placed either actually or constructively in the custody of the Court: if the fund has not been received or has been

[1] Clydesdale Bank *v.* Russel & Johnstone, 1859, 21 D. 886, *per* Ld. Kinloch (note); Winchester *v.* Blakey, 1890, 17 R. 1046, *per* Ld. M'Laren.

[2] *Per* Ld. Kinloch in Clydesdale Bank *v.* Russel, *ut sup.*

[3] Commercial Bank of Scot. *v.* Muir, 1897, 25 R. 219, *per* Lords M'Laren and Kinnear; *appd. per* Ld. Pres. Dunedin in M'Gillivray's Trs. *v.* Dallas, 1905, 7 F. 733.

received and subsequently paid away, or exists only *in spe*, an action of multiplepoinding with reference to it is incompetent. As a further general rule, it may be said that an action of multiplepoinding will not be sustained where the question in controversy is one which can more properly be determined in some more expeditious and less expensive form of action. A claim of the nature of a debt upon the fund, that is, a claim which goes to diminish the amount divisible amongst the claimants and not to demand a share of it, does not give rise to the kind of distress which authorises a multiplepoinding, if the holder of the fund is competent and willing to contest the claim, because in such a case the claim may be settled in an ordinary action at the instance of the claimant against the holder. So, when a son claimed legitim and his father's executor disputed his right, it was held that there was no such double distress as to make an action of multiplepoinding competent, the son's proper remedy being to bring an action of constitution against his father's executor.[1] So, where a tenant was sued by his landlord for payment of rent and by an assessor for the landlord's share of tax, which the landlord did not dispute the tenant's right to deduct from the rent, there was held to be no double distress.[2] A single arrestment is an insufficient ground for raising the action, the proper remedy of the arrestee being a suspension of the threatened charge.[3] Where a tenant, pending a reduction of his lease by the landlord, consigned the rents in bank, it was held that the proper action by an assignee of the landlord for payment of the rent was a direct action, and not one of multiplepoinding.[4] Where in an action of multiplepoinding the competition was between the heir to a security for a lunatic and the lunatic's next-of-kin, it was held that there was no such double distress as to justify a judicial factor holding the security in raising an action of multiplepoinding, his proper course being to petition for his discharge.[5] Where there is only one claimant to the fund there can be no double distress. Thus, where a creditor arrested on the dependence and the debtor was sequestrated before decree, it was held that an action of multiplepoinding was incompetent.[6] So, where

[1] Crokat *v.* Ld. Panmure, 1853, 15 D. 737.

[2] Logan *v.* Wilkie, 1855, 17 D. 485.

[3] Mitchell *v.* Strachan, 1869, 8 M. 154; Bank of Scot. *v.* Comrie, 1871, 8 S.L.R. 419; *cf.* Park *v.* Watson, *infra*, *and* Dill *v.* Ricardo's Trs., 1885, 12 R. 404.

[4] Clydesdale Bank *v.* Russel & Johnstone, 1859, 21 D. 886.

[5] Campbell *v.* Grant, 1870, 8 M. 988, *and see* 1869, 8 M. 227.

[6] Wishart *v.* Reynolds, 1900, 8 S.L.T. 108 (O.H.).

a person places a fund in the hands of a third party to meet a disputed claim,[1] or where a person who is the holder of a fund in connection with the right to which there is a dispute with another person, lodges the sum in bank in their joint names,[2] there is no double distress to justify an action of multiplepoinding. On the same principle, where a debtor placed funds in the hands of his law agent for the double purpose of paying that agent's account and of paying a dividend to his creditors, but before payment could be effected died, it was held incompetent for a creditor to raise an action of multiplepoinding in the agent's name, because, though the creditor alleged that he, the agent, and another creditor were all claimants to the fund, there was no real double distress.[3] Again, where a creditor in a bond and disposition in security sold the security subjects and consigned the balance of the price, there being a postponed creditor who, according to information supplied by the agent of the selling creditor to the debtor, had been paid off, there was held to be no double distress to make an action of multiplepoinding by the agent competent.[4] An action of multiplepoinding by a debtor to determine whether the heir of the executor of his creditor is entitled to payment of the debt, is incompetent if no claim has been made by the heir,[5] and it is equally incompetent to resort to that process as a means of constituting a disputed debt in place of the appropriate action, or in place of an action of count and reckoning[6] or of suspension,[7] though in one case, in which two of the learned Judges expressed doubts as to the propriety of the decision, an action of multiplepoinding to ascertain the amount due to a child in an apportioned fund was held to be competent.[8] Where, in the distribution of an estate under a trust-deed, a non-acceding creditor alleged that the trustee was giving undue preferences, he was held not entitled to raise an action of multiplepoinding, it being pointed out that his proper course was either to apply for sequestration of his debtor or to sue for payment of his debt by direct action.[9] So an action of multiplepoinding by beneficiaries, on the ground that the trustees were paying claims

[1] Clark *v.* Campbell, 1873, 1 R. 281; Middleton *v.* Milne's Trs., 1843, 6 D. 316.

[2] Royal Bank *v.* Ellis, 1902, 10 S.L.T. 105 (O.H.).

[3] Glass *v.* Robertson, 1899, 1 F. 391.

[4] Milne *v.* Louttit's Trs., 1898, 5 S.L.T. 366 (O.H.).

[5] Great North of Scot. Rly. *v.* Gauld, 1863, 1 M. 1053.

[6] Park *v.* Mackersy, 1843, 5 D. 482.

[7] Moncreif *v.* Bethune, 1844, 6 D. 1100.

[8] Dunbar *v.* Sinclair, 1850, 13 D. 54; *cf.* Ogilvie's Trs. *v.* Chevalier, *infra*.

[9] Kyd *v.* Waterson, 1880, 7 R. 884.

which they disputed, was held incompetent, since no beneficiary is entitled to throw the trust estate into litigation against the wish of the trustees merely because of their intention to admit a debt which he does not think due.[1] Even if there be double distress, an action of multiplepoinding is incompetent if, while the action relates to the whole fund *in medio*, the distress relates to only a part of such fund,[2] the fact of the existence of a proper competition to a portion only of the fund affording no ground for throwing the whole fund into Court in an action of multiplepoinding.[3] Where there is no fund *in medio* actually in existence, there can be no action of multiplepoinding. Thus, where an executor under a will paid away the whole estate to the beneficiaries before the expiry of six months from the testator's death, and thereafter one of the heirs *in mobilibus* claimed a share in the estate on the footing of intestacy, alleging that the will was spurious, and raised an action of multiplepoinding of the estate left by the deceased in the hands of the executor, it was held that the action was incompetent, there being neither a fund *in medio* nor double distress.[4]

*Cases of Double Distress.*—Where funds which had been subscribed for a definite purpose were claimed by two parties amongst the subscribers, it was held that an action of multiplepoinding by one party was competent, on the ground that such a process was competent to determine to which of the claimants the fund belonged, or to decide that it belonged to neither, and therefore fell to be repaid to the subscribers.[5] It is no objection to the competency of the action that one of the competing claimants holds a decree for his debt while the other does not; so, where a sum due under a decree for expenses in name of the agent disburser was claimed by an arresting creditor of the client, it was held that an action of multiplepoinding was competent.[6] An action of multiplepoinding does not, however, necessarily have the effect of stopping diligence.[7] An action of multiplepoinding was held competent to determine the right to the value of a crop in the hands of an incoming tenant which the landlord and a creditor arrester

[1] Robb's Trs. *v.* Robb, 1880, 7 R. 1049; *see also* Gordon *v.* Gordon, 1895, 33 S.L.R. 355; MacKenzie's Trs. *v.* Sutherland, 1895, 22 R. 233.

[2] M'Nab *v.* Waddell, 1894, 21 R. 827.

[3] *See also* M'Gillivray's Trs. *v.* Dallas, 1905, 7 F. 733; Johnstone *v.* Richardson, 1905, 13 S.L.T. 537 (O.H.).

[4] Richardson *v.* Wilson, 1905, 12 S.L.T. 775 (O.H.).

[5] Connell *v.* Ferguson, 1857, 19 D. 482; *cf.* Ewing *v.* M'Gavin, 1831, 9 S. 622.

[6] Pollard *v.* Galloway, 1881, 9 R. 21.

[7] Ferguson *v.* Bothwell, 1882, 9 R. 687.

both claimed.[1] And it has been held competent to raise an action of multiplepoinding to ascertain whether an absentee, whose estate was claimed by a person who raised the action in the absentee's factor's name, was actually dead, and if so to whom the estate belonged.[2] The action has been held to be a competent process for ascertaining the respective rights of a trustee in bankruptcy and persons claiming a right over the fund in respect of certain advances and a lien.[3] Where a sum of money had been deposited in bank in the joint names of two persons, and each of these persons claimed the sum so deposited, it was held that the question might competently be determined in an action of multiplepoinding[4]; but that case is to be distinguished from one where the money deposited in bank was placed on deposit-receipt in the name of one person and claimed by another.[5] Similarly, where a sum of money was placed in the hands of a third party, it was held that that person might competently institute an action of multiplepoinding in order to have it decided how he was to dispose of the fund and so obtain his discharge.[6] And where a person arrested goods in the hands of a railway company for the price of which a receipt was produced by another claimant, it was held that the question might competently be determined in an action of multiplepoinding.[7] Where the holder of a bill of exchange and a person who disputed his title both claimed the sum due under the bill, the latter having informed the acceptor that the holder had obtained the bill by fraud and having requested him to refuse payment, it was held there was sufficient double distress to make an action of multiplepoinding competent.[8] While it is true that the claims which are said to be competing must not be random claims but real and intelligible claims upon the fund *in medio*, it will not suffice to render an action of multiplepoinding incompetent that one or more of these claims is alleged to be groundless, since if they are stated with sufficient precision as to make them definite claims upon the fund, it is not for the holder of the fund, but for the Court, to determine their validity.[9]

[1] Park *v.* Watson, 1874, 2 R. 118.

[2] Meikle *v.* Tait's Factor, 1890, 17 R. 1182.

[3] M'Dowall & Nelson's Tr. *v.* Hagart & Co., 1905, 8 F. 235, *appg.* Commercial Bank *v.* Muir, 1897, 25 R. 219.

[4] Commercial Bank *v.* Muir, *sup.*

[5] Royal Bank *v.* Ellis, *sup.*

[6] Winchester *v.* Blakey, 1890, 17 R. 1046.

[7] N.B. Rly. Co. *v.* White, 1881, 9 R. 97.

[8] Agnew *v.* White, 1899, 1 F. 1026; *see also* Lattimer *v.* Wight, 1880, 18 S.L.R. 57.

[9] Royal Bank *v.* Price, 1893, 20 R. 290; Fraser's Exrs. *v.* Wallace's Trs., 1893, 20 R. 374.

Where a person stored goods which were arrested in the custodier's hands by a third party, it was held that the question of the right to the goods as between such arrester and a person who claimed to be their owner might competently be determined in an action of multiplepoinding.[1] Where the fund *in medio* consisted of the assets of a private partnership which remained in the hands of a trustee for the firm's creditors after payment of the partnership debts, it was held that an action of multiplepoinding was a competent process for determining the rights of the partners to such assets, the question being one of accounting between them.[2] And the action has been held competent where the fund *in medio* was neither definite nor ascertained.[3] The question whether articles coming into the hands of Procurators-Fiscal and other officers of justice can be validly arrested in their hands, has not been expressly decided, though the practice is common, but the competency of determining the right to such arrested funds by an action of multiplepoinding is settled.[4]

**Actions by Trustees for Exoneration.**—In such action the trustees, or other holders of the fund, do not require to allege that they are subject to double distress, and it is enough to make the action competent that they aver that without judicial exoneration they are unable to obtain their discharge.[5] Thus, if there be numerous claims upon the estate which they administer, some of which are open to objection, and the holders of the fund are bound to distribute it among the beneficiaries within a fixed period,[6] or if the beneficiaries refuse to discharge the holders,[7] or if a claim be made upon the fund by one of the holders, which the beneficiaries dispute and the claimant refuses to raise an action to determine his right,[8] an action of multiplepoinding is competent. Where, again, the estate of a deceased person is insufficient to meet all the claims made upon it, and the trustees are in doubt as to which claims should be admitted and which rejected, they are entitled to apply to the Court

[1] Ross *v.* Plano Co., 1902, 10 S.L.T. 203 (O.H.); *see* Dill & Co. *v.* Ricardo's Trs., 1885, 12 R. 404.

[2] Tait *v.* Geddie, 1896, 3 S.L.T. 452.

[3] Highland Rly. Co. *v.* B. L. Bank, 1901, 33 S.L.R. 584 (O.H.); Royal Bank *v.* Livie, 1903, 11 S.L.T. 549 (O.H.).

[4] Stuart *v.* Cowan & Co., 1883, 10 R. 581.

[5] Dunbar *v.* Sinclair, 1850, 13 D. 54.

[6] M'Dougall's Trs. *v.* M'Dougall, 1830, 8 S. 1036.

[7] Taylor *v.* Noble, 1836, 14 S. 817.

[8] Blair's Trs. *v.* Blair, 1863, 2 M. 284.

for direction in an action of multiplepoinding.[1] So an action of multiplepoinding is competent to test the validity of a deed of appointment,[2] or to determine the construction of a will as to whether certain heritable property belonging to the deceased falls to his heir or to his executors.[3] The difficulty must, however, be real, and the action must contain conclusions for exoneration. Where trustees brought an action to obtain the guidance of the Court in their administration of the trust estate, the Court dismissed the action on the ground that there were neither averments sufficient to imply that they were subject to double distress nor conclusions for exoneration.[4] And it will not entitle the trustees to bring the action that a person has refused a discharge who, after stating a claim, has by letter withdrawn it and agreed to the money claimed being paid to the competing claimant.[5] The form of judicial exoneration and adjustment of competing claims effected by an action of multiplepoinding is one which may competently be resorted to by trustees and others occupying a similar fiduciary position, not only where there is actual but even where there is a possible conflict of claims; but it is not the appropriate process for the settlement of questions of right which not only have not emerged, but which do not require to be carried into effect till a future date. Thus an action of multiplepoinding is not a competent process for determining how a fund is to be divided at the death of a liferenter who is still in life.[6] Where trustees or others are placed in the position of having to administer an estate, as to the right to which there is, in the absence of competing claims, a doubt which of two parties is entitled, their proper course is to take competent legal advice as to which of the parties has the better right, and thereafter to ascertain from the other party whether he desires to make a claim upon the estate, and whether such claim should be made the subject of an action; if his answer be in the negative, they are then in safety to pay over the estate to the other person in accordance with the legal advice they

[1] Jamieson *v.* Robertson, 1888, 16 R. 15.

[2] Ogilvie's Trs. *v.* Chevalier, 1874, 1 R. 693.

[3] Edin. Maiden Hospital *v.* Greig's Trs., 1902, 10 S.L.T. 317 (O.H.); *see also* Byre's Trs. *v.* Gemmell, 1895, 34 S.L.R. 569; Boyd's Trs. *v.* Boyd, 1906, 13 S.L.T. 878 (O.H.).

[4] Paterson's Trs. *v.* Paterson, 1899, 7 S.L.T. 154 (O.H.).

[5] Connell's Trs. *v.* Chalk, 1878, 5 R. 735.

[6] Nimmo *v.* Murray, 1863, 1 M. 791; Provan *v.* Provan, 1840, 2 D. 298.

have obtained; if it be in the affirmative, they are justified in obtaining the opinion of the Court in an action of multiplepoinding.[1] The action is not competent to a judicial factor, who, being an officer of Court, must obtain his discharge in the usual way by petition, and not by an action of multiplepoinding for exoneration.[2]

**Forum.**—The action may competently be raised either (1) in the jurisdiction in which the fund or subject *in medio* is situated, or (2) in that to which the arrestee or holder of the fund is subject,[3] even although the claimants reside in other parts of Scotland or abroad. The action is an exception to the rule that the defender must be personally subject to the jurisdiction of the Sheriff, in so far as it is competent to raise the action in the jurisdiction in which the fund is situated. All persons who have, or may have, claim to the fund may be summoned as defenders, whether they are otherwise subject to the jurisdiction or not. So, in the case of defenders not domiciled in Scotland, arrestment to found jurisdiction is unnecessary.[4] The provisions of the section have, however, effected an alteration in the previous law, since prior to the passing of the Act of 1907 the action could not be competently raised in the jurisdiction to which the holder of the fund or arrestee was subject, unless such jurisdiction was also that in which the fund *in medio* was situated[5] Now, however, the claimants to the fund whose interest in it is real, as opposed to that of the holder whose interest (unless he be also a claimant) is purely nominal, have a choice of jurisdiction, which they may exercise according to the balance of convenience. If the jurisdiction selected be that which on any ground is the less convenient or desirable, the Sheriff has power to remit the action, on sufficient cause, by interlocutor stating his reasons, to the jurisdiction which may be more convenient.[6]

**Procedure.**—The action is competent at the instance of the holder of the fund, or of any of the claimants. As the holder is the nominal pursuer in all cases, the party raising the action must set forth in the instance of the writ the name and designation of

[1] M'Gillivray's Trs. *v.* Dallas, 1905, 7 F. 733, *per* Ld. M'Laren.
[2] Campbell *v.* Grant, 1870, 8 M. 988.
[3] Act, s. 6 (g), Rule 128.
[4] Miller *v.* Ure, 1838, 16 S. 1204; Jamieson *v.* Robertson, 1888, 16 R. 15.
[5] Act, 1876, s. 47.
[6] Act, Rule 20.

the real raiser.[1] If the pursuer be only the nominal raiser, the writ must be served on him as well as on the defenders, who are the different claimants so far as known to the raiser. The crave of the writ is that the pursuer may be declared to be liable only in once and single payment or delivery to those having right, and that he is entitled on payment, delivery, or consignation, to be exonered and to get his expenses. It concludes by asking that decree should issue in favour of the party or parties who may be found entitled to the fund *in medio*.[2] Service of the writ is effected in the ordinary way, and appearance need be entered only by those parties who intend to lodge defences to the competency of the action.[3] The cause is then enrolled for tabling on the first Court day after the expiry of the induciæ.[4]

*Ascertaining Fund* in medio.—The first matter for discussion is the existence and amount of the fund *in medio*. If the nominal raiser admits possession of the fund *in medio* and his liability to account for it to the real raiser and the other claimants, and the other parties are satisfied with the statement of its amount in the initial writ, then the necessity for further litigation in the matter is obviated; an order is pronounced in terms of the crave, finding the nominal raiser liable in once and single payment of the fund, and the competing parties are ordered to lodge their respective claims. If at this stage the nominal raiser consigns the fund, he becomes thereupon entitled to his exoneration and discharge, and finally disappears from the process, leaving the various claimants to continue the battle for possession of the fund. He may be ordered to consign the fund.[5] If the holder of the fund be only the nominal raiser of the action, the real raiser at this stage may be awarded his expenses at once out of the fund *in medio*.[6] If, on the other hand, the nominal raiser disputes his liability to account to the real raiser and the other claimants, he lodges defences to the competency of the action, and these defences are disposed of *primo loco*. If the

[1] Act, Rule 129.

[2] *See* Sch. A to Act of 1876; no corresponding provisions have been made by the rules of the Act of 1907.

[3] Connell v. Ferguson, 1861, 23 D. 683.

[4] Act, s. 34; an action of multiplepoinding is necessarily a "defended" cause, in the sense that it cannot be disposed of by a decree in absence, an order for claims, even if there be no defences, being imperative.

[5] Lang *v.* Downie, 1872, 9 S.L.R. 308.

[6] Hepburn's Trs. *v.* Rex, 1894, 21 R. 1024; *see* Act, Rule 129.

initial writ contain no sufficient specification of the fund *in medio*, or if, while admitting possession of the fund *in medio*, the nominal raiser disputes its amount as stated, a condescendence of the fund is ordered to be given in by him, the other parties being allowed, if so advised, to lodge defences. A record is then made up, and the question as to the extent of the fund *in medio* is determined as in an ordinary action.

*Order for Claims.*—On its being admitted or established that there is a fund *in medio*, that is in all cases where no defences have been stated to the condescendence, or where defences have been stated and repelled, the Sheriff then finds the nominal raiser liable in only once and single payment of that fund, and orders claims and, if necessary, answers to be lodged within a certain short space.[1] If the holder of the fund be only the nominal raiser and have no claim upon it, he may be, and generally is, at this stage ordered to consign, and upon consignation he obtains a decree of exoneration with expenses. Such expenses form a preferable charge on the fund *in medio*. The real raiser may also be allowed the expenses of raising the action, if there be no question as to the propriety of raising it: if there be such a question, expenses should be reserved. If there be any doubt that all possible claimants have been cited as defenders, it is usual to advertise for claims at this stage; advertisement cannot safely, however, be substituted for citation in the case of claimants known to exist.

*Record and Disposal of Claims.*—The claim known technically as a condescendence and claim consists of three parts: (1) a condescendence setting forth the facts upon which the claimant bases his right to the whole or a share of the fund *in medio*, stated as in an ordinary condescendence; (2) the pleas-in-law on which he relies to establish his right; and (3) a claim, properly so called, in which he states precisely whether he claims the whole or only a part of the fund *in medio*. The claim is an essential part of the document, since if no claim be made the claimant cannot be preferred to any part of the fund.[2] Several claimants may state the facts on which they base their claims in the same paper (or one claimant may "adopt" the facts as stated by another claimant in his condescendence), but, where it is necessary, each claimant must append a separate claim

[1] Act, Rule 130; Act, 1876, s. 25 (2).

[2] Connell *v.* Ferguson, 1861, 23 D. 683.

and separate pleas-in-law.[1] At the expiry of the period for lodging claims, the parties are appointed by the Sheriff to meet for the adjustment of claims. If, before the order for adjustment is pronounced, it should be found necessary to afford the parties an opportunity of revising their claims so as to meet or answer averments made by the other claimants, the Sheriff may, as in an ordinary process, order such a revisal. When it is apparent from the outset that such procedure is likely to become necessary, the order for revisal is included in the interlocutor ordering claims to be lodged. When the claims are finally adjusted, with or without a revisal, the record is closed, the discussion and decision on the closed record proceeding thereafter as in an ordinary action. The claims lodged show whether there is a competition between the claimants or not, and if there be none the claimants may be ranked and preferred and the fund divided in terms of their respective claims.

*Claims Competent at any Stage.*—While of course claims ought to be lodged timeously, it is an important feature of the action of multiplepoinding that claimants may appear at any stage of the process, it being in the discretion of the Court to say whether such claims shall be allowed to be received, and if so, upon what conditions. As a general rule, the only penalty which is exacted from a late claimant is the payment of such expenses as the Court may think reasonable. Thus, when certain claimants who had been duly cited did not appear till the ground on which their claim was based had been vindicated by another claimant, the Court held that they were not entitled to lodge a claim except upon the payment of the other claimant's full expenses, including even those relating to a part of the cause on which he had been unsuccessful.[2] When, however, they neglect to appear till decree of preference has been or is about to be pronounced, they may be refused admission and left to protect their interests by declarator, or as best they can.[3] But the matter is in the discretion of the Court, and that discretion may be exercised to refuse the admission of new or amended claims if the circumstances are such as to make that course equitable.[4] Where, however, a claimant was able to show that his dilatoriness had been due not to his fault, but

[1] Act, Rule 131.

[2] Cowan's Trs. *v.* Cowan, 1888, 16 R. 7; *see* Binnie's Trs. *v.* Henny's Trs., 1883, 10 R. 1075.

[3] Morgan *v.* Morris, 1856, 18 D. 797.

[4] Wilson's Trs. *v.* Clydesdale Bank, 1900, 8 S.L.T. 23 (O.H.); Landale *v.* Wilson, 1900, 2 F. 1047.

to the fact that the action had neither been served upon him nor advertised, the Court allowed him to lodge his claim on payment of a proportion of the expenses incurred by the claimants who had appeared, lodged claims, and been ranked on the fund.[1] And where a party had been abroad and was unaware of the proceedings, he was allowed, after a proof had taken place, to lodge his claim without payment of any expenses.[2] The decree ranking a claimant may give that ranking "for aught yet seen," a form of interlocutor which is conclusive against persons cited who neither appear nor appeal against the decree of preference. Where, in one case, it was discovered, four years after the date of such an interlocutor ranking the only claimant to the whole fund, that persons were alive who should have been called, but were not because the fact of their existence was unknown, the Court, on an explanation made by the real raisers, ordered intimation of the action to the new defenders, who duly lodged claims.[3] After decree of preference has been pronounced, the Court may or may not allow amendment of a claim. Thus, in one case a claimant was not allowed, after judgment, to amend his claim to the effect of enabling him to obtain the benefit of a judgment pronounced in the case of a claimant who had made his claim in proper form.[4] In another a claimant was allowed, after judgment rejecting his claim had been pronounced, to lodge a new claim on other grounds on payment of the expenses found due by him.[5] In another case, leave to amend a claim after decree had been pronounced and become final, was refused on the ground that the proposed amendment was merely an averment of a novel construction of a deed which had all along been before the Court.[6]

*Effect of Interlocutor.*—The effect of an interlocutor ranking and preferring a claimant or claimants to the fund and decerning for payment, is to secure the holder who pays from any further claims at the instance of parties to the action. Where the decree has become final, the only remedy of a defender duly cited is an

[1] National Bank *v.* Campbell, 1901, 4 F. 17.

[2] Sawer's Factor *v.* Sawers, 1889, 17 R. 1.

[3] Gauden's Trs. *v.* Jamieson, 1902, 10 S.L.T. 215 (O.H.); *see* Union Bank *v.* Gracie, 1887, 25 S.L.R. 21.

[4] Graham's Trs. *v.* Graham, 1868, 6 M. 820; *cf.* Purves' Tr. *v.* Purves, 1900, 8 S.L.T. 179 (O.H.).

[5] Dymond *v.* Scott, 1877, 5 R. 196; *cf.* Scot. Life Assurance Co. *v.* Donald, 1902, 9 S.L.T. 293 (O.H.); Cameron *v.* Young, 1873, 45 Jur. 272.

[6] Terrell *v.* Kerr, 1900, 2 F. 1055.

action of reduction, and when payment has been made under the decree the only remedy is an action against the person who has received payment; the holder of the fund is no longer liable.[1] After a decree of preference has been carried into effect, there is no longer a fund, and therefore there can be no claim. Such a decree is a decree of exclusion, and when pronounced in favour of one party is final against all other competitors who do not appeal within the proper time.[2]

**Riding Claim.**—A creditor of a claimant who is in right of a liquid and presently exigible debt may lodge a riding claim upon his debtor's claim, in virtue of which he may obtain payment of his debt out of such share of the fund *in medio* as the claimant may ultimately be found entitled to. The interest necessary to support a riding claim must be an arrestment, assignation, bond, bill, or other liquid document of debt.[3] The creditor of a direct claimant can claim in the multiplepoinding in no other way.[4] The riding claim must be lodged before the original claimant has obtained a decree of payment, though in one case it was allowed to be received after a judgment of ranking and preference.[5]

## IV. Proving of the Tenor

It may be doubted whether this action is competent in the Sheriff Court. The matter is referred to elsewhere.[6]

[1] Geikie *v.* Morris, 1858, 3 Macq. 353, *per* Chelmsford, Ld. Ch.; *cf.* Sawer's Factor *v.* Sawers, *sup.*

[2] Duncan's Factor *v.* Duncan, 1874, 1 R. 964.

[3] Royal Bank *v.* Stevenson, 1849, 12 D. 250.

[4] Gill's Trs. *v.* Patrick, 1889, 16 R. 403.

[5] Scot. Life Ass. Co. *v.* Donald, 1902, 9 S.L.T. 293 (O.H.).

[6] *See ante*, Actions Competent, Chap. IV. p. 74.

# CHAPTER XXIX

## ACTIONS OF FORFEITURE OF FEU RIGHTS, MAILLS AND DUTIES, REGULATION OF MARCHES, AND OF REMOVAL AND EJECTION

### I. Actions for Forfeiture of Feu Rights.

Under the Act of 1907, declarators *ob non solutum canonem* appear to be competent to the same extent as are other actions of declarator, and follow the same procedure.

### II. Actions of Maills and Duties

Maills and duties are two old Scots words signifying the rents of an estate, whether in money or grain; hence an action for the recovery of the rents of an estate is termed an action of maills and duties. The action is either petitory or possessory, and is competent either to a proprietor or to one claiming right under a conveyance, legal or voluntary, or even an assignation to the rents. The action is competent in the Sheriff Court for rents of any amount. The persons who have a title to sue are proprietors of land, whether their feudal title is complete or not, liferenters, voluntary or judicial trustees, adjudgers and heritable creditors.[1] The defenders necessary to call vary according to the pursuers. In the petitory action, which is founded on a right in the pursuer on which no possession has followed. When a heritable creditor of the proprietor sues, it is necessary to call not only the tenants or possessors whose rents are to be recovered, but also the proprietor or liferenter, and the pursuer must support his right of action by the production of titles preferable or superior to theirs. In this action there is an exception in favour of the tenant, who is not liable for the arrears of rent after five years

[1] Ersk. iv. 1, 49; Bruce *v.* Grant, 1824, 2 S. 552.

from the time of his removing from the lands.[1] In the possessory action, on the other hand, where the proprietor himself sues, no other parties than those in natural possession of the ground need be called as defenders. It is, however, only where a heritable creditor of the proprietor sues the tenants or possessors of the lands of his debtor that the action presents any peculiarities, and it is to this form of the action that the name of maills and duties is now practically confined. A proprietor or heritable creditor infeft with a title *ex facie* absolute, or even with a bond and disposition in security, requires no process of law to enable him to draw the rents, and an action of maills and duties would be merely an idle formality and indeed incompetent, because only an encumbrancer requires to use such a process to give him a title in a question with the tenant to uplift the rents. If payment is refused, a proprietor or heritable creditor may bring an ordinary petitory action on his title, which at one time was deemed an action of maills and duties, but is not so now.[2] The action is incompetent at the instance of a superior for recovery of unpaid feu-duty, since he is not in possession, being excluded by his vassel's title[3]; and for the same reason it is incompetent to a heritable creditor whose bond covers the superiority of a feu.[4] It is inappropriate when directed against a proprietor who is himself in possession of the property, for since there is no tenant there is no rent to be attached.[5] The action is competent at the instance of the holder of a ground-annual, constituted by a contract in which the lands are conveyed in security.[6] The claim of bondholders in a bond and disposition in security as bare assignees will not cut down the right of a factor on the property to retain rents collected by him, and which the owner authorised him to retain against advances, and in order to make effectual the assignation of rents in their favour contained in the bond they must raise an action of maills and duties.[7] At common law a trustee in bankruptcy has a preferable title to a creditor in an action of maills and duties raised after the date of

[1] Act, 1669, c. 9.

[2] Scot. Herit. Secy. Co. *v.* Allan, Campbell, & Co., 1876, 3 R. 333; Neils *v.* Lyle, 1863, 2 M. 168.

[3] Prudential Ass. Co. *v.* Cheyne, 1884, 11 R. 871.

[4] Nelson's Trs. *v.* Tod, 1896, 23 R. 1000.

[5] Smith's Trs. *v.* Chalmers, 1890, 17 R. 1088.

[6] Somerville *v.* Johnston, 1899, 1 F. 726.

[7] Stevenson *v.* Dawson, 1896, 23 R. 496.

sequestration. The Bankruptcy Act of 1856 provided that in cases of the debtor's sequestration no decree of maills and duties, on which a charge had not been given sixty days before the date of sequestration, should be available in competition with the trustee, except for interest of the current half-yearly term, and the arrears of interest for one year immediately preceding such term.[1] That provision was, however, repealed by section 55 of the Conveyancing Act of 1874, and the common law is now restored, whereby a writ of maills and duties executed prior to the confirmation of the trustee is effectual in a question with the trustee for the full amount of the debt.[2]

The writ sets forth briefly the pursuer's title as a heritable creditor under a bond and disposition in security, or as the case may be: it is, however, probably sufficient to state the pursuer's title in the condescendence.[3] The crave concludes, and decree may be obtained, not only for past due rents, but for future rents until the debt is satisfied.[4] The defence to the action may be that pursuer's title is not sufficient to support the action, or that the defender's title is superior to that of pursuer. After decree, the pursuer is in possession of the estate and may use all remedies, such as sequestration, where competent for recovery of rent, whether against the tenants called as defenders or against those who have entered since.[5]

**Optional procedure under Heritable Securities Act, 1894.**—Under that Act the creditor in a heritable security may, without calling the tenants of the lands disponed in security as defenders, raise an action of maills and duties in the Sheriff Court in the form prescribed by the Act, which consists of a petition (in the form in use in the Sheriff Court prior to the Act of 1907) directed against his debtor as defender. The pursuer then gives notice of the raising of the action to the various tenants by sending to each a registered letter in the form prescribed by the Act. Receipt of such notice by a tenant interpels him from making payment of his rent to the defender, in the same manner and to the same effect as if he had been called as a defender to an action of maills and duties. Upon intimation of the decree in the action made to

[1] Bankruptcy Act, 1856, s. 118.

[2] *See* Saxty *v.* Smith, 1893, 1 S.L.T. 61 (O.H.).

[3] *See* Mackintosh *v.* Mackintosh, 1835, 13 S. 884.

[4] Bruce *v.* Grant, 1824, 2 S. 552; Woodward *v.* Wilson, 1829, 7 S. 566.

[5] Robertson's Trs. *v.* Gardner, 1889, 16 R. 705.

the tenants in the prescribed form, they must make payment of the rents due by them as if a charge upon a decree of maills and duties had been given, payment so made operating as a complete discharge and exoneration to them. But such decree does not affect the right of tenants to refuse payment of the rents on any ground not affecting the title of the creditor or the right of any prior creditor to enter into possession, and the Act does not prevent an action of maills and duties being raised in the form previously in use, or deprive a creditor of any existing right competent to him of entering into possession without having recourse to an action of maills and duties. The Sheriff of the county in which the lands held in security, or part thereof are situated, or if the lands are situated in more counties than one, the Sheriff of any of such counties has jurisdiction in all cases instituted under or in connection with the Act, whatever the value of the lands may be.

The Act of 1907 makes no special provisions with regard to this form of action. The action must presumably be raised by the form of writ provided by the Act of 1907, but the method of procedure rendered optional by the Heritable Securities Act of 1894 is otherwise still competent. Other proceedings competent under the Act are referred to later.

### III. Actions for Regulation of Marches

The regulation of march fences belongs to the jurisdiction of the Sheriff as Judge Ordinary of the bounds. By the Act 1661, c. 41, ratified by 1685, c. 39, if there be no fence, or an insufficient fence, between conterminous properties, the proprietor of one land may by an application to the Sheriff compel the conterminous proprietor to bear with him half the expense of a mutual fence or enclosure; and similarly, fences once made may be kept in repair at the mutual expense of the parties; or where no longer repairable, may be reconstructed, it being in the discretion of the Sheriff to decide whether an old fence should be simply repaired or re-built.[1] A tenant, contrary to the general rule, is bound, independently of stipulation, to maintain march fences erected by the landlord during the lease. The landlord is not, however, entitled to increase the burden on the tenant by erecting new fences not stipulated for, unless they be

[1] Paterson *v.* MacDonald, 1880, 7 R. 958.

march fences which a contiguous proprietor may compel him to erect, a liability which the tenant is presumed to have contemplated on his entry. By the Act 1669, c. 17, where the march is crooked or irregular, application may be made to the Sheriff to straighten it by taking as far as may be equal portions from each property and adding them to the other, and to determine the compensation to which either proprietor may be entitled by the operations necessary.[1] Considerable portions of land may be exchanged, but where the lands are entailed their exchange must be fortified by an excambion under the Montgomery Act. The regulation as to building and repairing fences is applicable only to lands suitable for being enclosed, and not to extensive moorlands. It is inapplicable, where there is a sufficient natural fence, to properties of less than five or six acres in extent, and to cases where the expense necessary would be out of all proportion to the benefit to be derived.[2] The regulation as to straightening a march cannot be carried out if there is a dispute as to the existing boundary. In that case the process must be sisted till the dispute is settled by a declarator and the actual boundary ascertained, after which the Sheriff may proceed to adjust it.

**Procedure.**—Processes for the regulation of march fences are conducted in the ordinary manner, the only peculiarity being that in straightening marches the Sheriff is required by the Act 1669, c. 17, to visit and inspect the ground. This duty cannot be delegated even of consent of parties, but the Sheriff may obtain such assistance from persons of skill as he may think expedient[3]; and the conclusion at which he may thus arrive after careful examination, will not be lightly disturbed by a higher Court.[4]

[1] Kintore *v.* Kintore's Trs., 1886, 13 R. 997.

[2] Ld. Adv. *v.* Sinclair, 1872, 11 M. 137.

[3] *Ibid.*

[4] Kintore *v.* Kintore's Trs., *supra.*

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INTRODUCTORY

**Nature of Actions.**—Though the terms removing and ejection have been not infrequently in the past used indiscriminately, they are not synonymous. By the law of Scotland, a tenant, by which is meant the lessee under a contract of lease, can be dispossessed only by a process of removing or ejection. No other form of action, whether of interdict or of suspension and interdict, is appropriate. Consequently, on the bankruptcy of a tenant, it is not competent to interdict him and his trustee from occupying the subjects,[1] though, if the tenant after being ejected returns or threatens to return to the subjects, an action of interdict is the appropriate remedy.[2] After the expiration of the stipulated endurance of a lease, the tenant is, however, notwithstanding the termination of his right of tenure, entitled to continue his possession of the subjects on tacit relocation from year to year, until he is legally removed by the landlord. Where the lease does not otherwise provide, the tenant must, in order to authorise a judicial removing from the subjects, be warned by the landlord to remove. Removing is therefore the process by which a tenant whose right of occupation has expired is judicially warned to remove from the subjects occupied by him, and if he fail to obey the warning so given, is removed or ejected from the premises. Ejection, on the other hand, is the process by which a person in occupation of heritable subjects, which he possesses no right or title to occupy, is ejected from them. In this category are included persons whose possession is vitious, that is, obtained by force and fraud; or precarious, that is, dependent on the will of the proprietor and founded upon no legal title. In the case of a person who has occupied heritable subjects

[1] Borrows *v.* Colquhoun, 1852, 14 D. 791, *revd.* 1854, 1 Macq. 691; Johnston *v.* Thomson, 1877, 4 R. 868.

[2] Boswell's Trs. *v.* Pearson, 1886, 24 S.L.R. 32.

under a legal title, but whose tenure of occupation has come to an end, the decree of removing cuts down the right which he formerly possessed, and as he therefore occupies the subjects without a legal right or title, ejection becomes the competent remedy against him. In an action of removing, therefore, the tenant is ordered to remove himself from the subjects of which he is in occupation; in an ejection, whether consequent upon his failure to obey the order to remove, or based upon the absence of legal title to occupy the lands, he is thrust forth. The word ejection therefore, besides meaning the independent action by which a person possessing no right or title of occupation is removed, may also be used to signify the diligence by which a decree of removing is carried into effect. And it may also be used to mean the actual carrying out of the tenant's removal, whether such removal has been preceded by an action of removal or of ejection or not.

## I. PRIOR TO THE ACT OF 1907

### 1. *Removings*

Under the nomenclature in use prior to 1907, removings were divided into two classes, ordinary and extraordinary. An ordinary removing was that which occurred at the natural termination of the tenant's rights, the period for which the subjects were let having by the simple lapse of time expired; while extraordinary removings were those which occurred where the tenant's right was interrupted during the currency of the lease by a legal or conventional irritancy. Ordinary removings were again sub-divided into two classes, "solemn," or those in which an action of removing required to be raised at least forty days before the term of removal, and "summary," or those in which less formal proceedings were requisite, as where (*a*) a verbal warning was sufficient, (*b*) where the subjects were, under the Act of 1838, let for less than a year, and (*c*) where under the Act of 1853 the tenant had expressly or by implication come under an obligation to remove from the premises. This summary removing was, however, sometimes confused with another summary proceeding, more properly termed a summary ejection, which occurred in the case of subjects let for less than a year and less than £30 rent. Summary was therefore sometimes used as synonymous with expeditious, and sometimes to denote a separate form of pro-

cedure. Thus, in one sense all extraordinary removings were summary, in respect that the defender was ordained to remove himself forthwith, and not at the ensuing term or at that of the natural expiration of his right to occupy. The term was, however, properly and justifiably used only to denote the particular form of procedure, technically known as summary, in which the formality and delay inseparably connected with the ordinary form of action was absent.

The Act of 1907 does not deal with extraordinary removings at all, and it provides that with regard to ordinary removings the procedure in use prior to the passing of the Act is still to be competent. The action of removing was instituted by the Act 1555, c. 39, and prior to 1907 the procedure relating to it was governed mainly by two Acts passed at widely distant intervals of time, the Act of Sederunt of 14th December 1756, and the Sheriff Court Act of 1853. The Act of 1555, which conferred jurisdiction both upon the Supreme and Sheriff Courts, though never specifically repealed, has long been obsolete, and since 1756 the action of removing has been specifically appropriated to the Sheriff Court. That Act continued to regulate actions of removing for practically a century, when by the Act of 1853 its provisions were superseded. Up till the passing of the Act of 1907 the forms of procedure introduced by the Act of 1853 continued to regulate practice. By the passing of subsequent legislation, however, such as the Agricultural Holdings Acts of 1883 and 1890, and the Removal Terms Acts of 1886 and 1900, some confusion was created, and the application of the provisions of those Acts to the forms of procedure in use under the Act of 1853 was left in some doubt. It will therefore perhaps be convenient before considering the provisions of the Act of 1907, and perhaps necessary to appreciate their effect, to give a brief outline of the provisions of the earlier Acts, which the Act of 1907, while introducing some amendment and alteration, consolidates.

**1. "Ordinary" Removings.**—(*a*) *Ejections without Action of Removing or Ejection.*—Formal leases generally contain an express obligation on the tenant to remove from the premises let at the expiry of the lease without any previous warning or process of removing. The obligation to remove may, however, be contained in a writing other than the lease, executed usually within some short period before

the time of removing, though it cannot be instructed verbally. But this obligation is literally construed and enforced, in the sense that warning is unnecessary and that the landlord may apply for summary ejection, in all cases where the obligation, whether contained in the lease or otherwise instructed, is dated within a year of removal. But before the end of the seventeenth century it had come to be settled that intimation of some kind was necessary by the landlord to the tenant before ejection could be carried out. The Act of Sederunt of 14th December 1756, declaring a rule which prior to that date had been practically established, made the period of warning forty days in all cases where the tenant had come under an obligation to remove. A charge on letters of horning on the registered lease given forty days before Whitsunday was sufficient to authorise ejection within six days after the term of removal in the tack. That form of removal was applicable against tenants of "lands, mills, fishings, and possessions whatsoever." But in these categories urban tenements, country houses to which no land was attached, coal mines, works, and grass parks let from year to year were not included. As to all of which the agreement of parties, or common law qualified to a certain extent by consuetude, afforded the rule as to reasonable notice. The remedy provided by the Act of Sederunt was superseded, though not abrogated, by sections 30 and 31 of the Sheriff Court Act, 1853, which contain a convenient imitation of the system of decree following on a consent to registration for execution. Section 30, which regards a definite ish in a probative lease as equivalent to an obligation to remove, provides that where lands or heritages are held under a probative lease, specifying a term of endurance, such lease or an extract thereof from the books of any Court of Record, is equivalent to an extract decree of removing obtained in an ordinary action of removing at the instance of the grantor, or any one in his right, against the party in possession, whether he be the lessee named in the lease or not; and such lease, or an extract of it, along with a written authority signed by the landlord, his agent, or his factor, is a sufficient warrant to any Sheriff-officer or messenger-at-arms within the county in which the lands are situated, to eject the party in possession from the lands on the lapse of the specified term: provided that notice to remove shall have been given at least forty days before the ish (or the ish first in date if there be more than one), personally or at his ordinary dwelling-house, or through the post-office

in the statutory form by an officer. A certificate of service signed by an officer and attested by one witness, or an acknowledgment signed by the party in possession or his agent, endorsed on the lease or extract, is made sufficient evidence of the service. The removal or ejectment must take place not later than six weeks after the ish (or last ish). By section 31 the same force and effect is given *mutatis mutandis* to a letter of removal granted in the statutory form by a tenant in possession, either at his entry or at any other time, and holograph or tested by one witness, such letter being a sufficient warrant to an officer of Court to remove and eject the tenant or any one in his right on the expiry of the term or terms specified in it. If the letter be dated more than six weeks before the term of removal or the ish first in date, notice of forty days must be given, and a certificate or acknowledgment as before given. The Agricultural Holdings Act of 1883, in section 28 effected an important alteration in the law by providing that notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—(*a*) in the case of leases of three years and upwards, not less than one year nor more than two years before the termination of the lease; (*b*) in the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease. Failing such notice by either party, the lease is held to be renewed by tacit relocation for another year, and thereafter from year to year. Notice by the landlord to the tenant is given in the form prescribed by the Sheriff Court Act of 1853, and comes in place of the notice required by that Act. The section did not, however, in any way affect the right of the landlord to remove a tenant who had been sequestrated under the Bankruptcy Acts, or who by failure to pay rent or otherwise had incurred an irritancy of his lease or other liability to be removed. The provisions relative to notice do not apply to any stipulation in a lease entitling the landlord to resume land for building purposes, or to any subjects let for less than a year. The Act is limited in its application to holdings that are wholly agricultural or wholly pastoral or in part agricultural, and as to the residue pastoral or in whole or in part cultivated as a market garden, and does not apply to those let to a tenant during his continuance in any office, appointment, or employment of the landlord.

**2. "Solemn" Removings.**—Where valuable subjects are let, the contract is commonly reduced to probative form and contains a stipulation fixing a definite ish. If a lease contain an obligation to remove, express or implied, it has been seen that a form of procedure exists by which the tenant may be ejected without the necessity for raising an action of removing or ejection. That alternative method of procedure, introduced by the Act 1555, and extended and amended by the subsequent Act of Sederunt of 1756, the Sheriff Court Act of 1853, and the Agricultural Holdings Act of 1883, is limited in its scope to certain classes of subjects. Solemn removings are those in which certain formal warning of a defined length must be given prior to the raising of the action of removing, as distinguished from summary, which will be considered later. The Act of 1555, c. 39, was passed in order to rid the country of the violence, often of the most wholesale kind, which was a usual accompaniment of the older removings on verbal warning only. That Act provided for removings from "lands, mills, fishings, and possessions whatsoever." It thus afforded a competent remedy for all classes of subjects, and required that lawful warning should be made (*a*) upon a precept from the landlord; (*b*) any time within the year, but not less than forty days before Whitsunday; (*c*) according to certain rules for personal or equivalent citation; and (*d*) with publication within and on the parish church. On the tenant's failure to remove, the landlord might obtain from the Court letters or precepts calling the parties warned to appear: in other words, might bring an action of removing. The Act of Sederunt of 1756 amended these provisions by enacting that in cases where the tenant had come under no obligation to remove without warning, the landlord might either, in his option, adopt the procedure provided by the Act of 1555, or bring an action of removing before the Judge Ordinary of the county in which the subjects were situated. Such action, if raised at least forty days before the term of Whitsunday, was to be equivalent to a warning under the previous Act; and the Judge thereupon is directed to determine in the removing as if a warning had been executed in terms of that Act. Under that Act, as under the former, the term of Whitsunday was retained as the only date to be looked at in giving notice of removing. The Sheriff Court Act of 1853 remedied that defect by providing that a summons of removing might be raised at any time, provided only there was an interval of at least forty days

between the date of the execution of the summons and the term of removal, or where there was a separate ish as regards lands and houses or otherwise, between the date of the execution and the ish first in date. The Agricultural Holdings Act of 1883 provided, with regard to the subjects falling under its scope, that there must be a written notice by either party in the case of leases of three years and upwards, dated not less than one year nor more than two years before the termination of the lease; in the case of leases for shorter periods, not less than six months before the termination of the lease. In leases falling under this provision, and not containing an obligation on the tenant to remove, the landlord required to bring an action of removing. The Agricultural Holdings Act of 1900 provides that the notice of termination of the tenancy under section 28 of the former Act may be given in the same manner as a notice of removal under section 6 of the Removal Terms Act, 1886 (*infra*).

3. **"Summary" Removings**, or those to which the Act 1555 and the Act of Sederunt of 1756 do not apply. The subjects to which such proceedings are appropriate are urban tenements and small holdings. Removal from the former is regulated by custom, while removals from the latter were regulated by the Sheriff Court Act of 1838. By sections 5 and 6 of the Removal Terms Act of 1886, where a house, other than a dwelling-house or building let along with land for agricultural purposes, is let for a period not exceeding four months, notice of removal must, in the absence of express stipulation, be given as many days before the date of ish as are equivalent to at least one-third of the full period of the duration of the lease; and notice of removal from such house is sufficiently given by registered letter, signed by the person entitled to give it, or by his law agent or factor, and posted at any post-office in the United Kingdom in time to admit of its being delivered at the address thereon, on or prior to the last date upon which by law such notice must be given, addressed to the person entitled to receive it, and bearing his address if known, or his last known address. The customary period of warning is forty days.

The Sheriff Court Act of 1838 provided that where houses or other heritable subjects are let for any shorter period than a year, at a rent not exceeding £30 per annum, it should be competent for any person entitled to pursue a removing to present a summary complaint to the Sheriff of the territory, who was required to order

it to be served, and the defender to be ordained to appear on such day as the Sheriff might deem proper. The citation and further procedure was the same as that provided for small-debt causes. The decree under this Statute was final, and not subject to review either in the Circuit Court of Justiciary or the Court of Session. Provision was also made for reponing adjournment and the giving in of written answers by the defender upon finding caution.

**Summary of Law prior to Act of 1907.**—The result of these various enactments may be briefly summarised thus:—

1. Where a probative lease specifies a term of endurance, the lease, or an extract of it, from the books of any Court of Record, has the same force and effect as an extract decree of removing obtained at the instance of the landlord against the tenant, provided that certain conditions are complied with. These conditions are that (*a*) due notice shall be given to the tenant before the expiry of the term or the first ish; (*b*) the notice is proved by certificate or acknowledgement; (*c*) the officer ejecting has the written authority of the landlord, his factor or agent; and (*d*) the ejectment takes place within six weeks from the expiry of the latest term of endurance.

2. Where a tenant grants a letter of removal, holograph or tested by one witness, in the form provided by the Act of 1853, the letter has the same force and effect as an extract decree of removing, and is sufficient warrant to any Sheriff-officer of the county within which the premises are situated, to eject the tenant, provided certain conditions are complied with: (*a*) if the letter is dated more than six weeks before the term of removal, notice must be given and proved as in the case of a probative lease (*sup.* 1); and (*b*) the ejection must be carried out within six weeks from the term.

3. In lands let for agricultural purposes, the landlord having given the statutory notice under section 28 of the Agricultural Holdings Act of 1883, and in the form provided by the Sheriff Courts Act of 1853, must raise an action of removing in such time as to leave an interval of at least forty days between the date of execution and the term of removal; if there be two terms, one for houses and the other for land, the execution must be timed for the one that comes first. By section 4 of the Removal Terms Act of 1886, in the case of all dwelling-houses and buildings, whether with or without land, and all shops, the removal terms, apart from express

stipulation, are for Whitsunday (the 28th of May) and for Martinmas (the 28th of November), both at noon; but where forty days' warning is required, it must be given before 15th May and 11th November respectively.

4. In non-agricultural subjects it is not altogether clear when an action of removing is requisite. For such subjects as mills (not being within burgh), mines, and fishings, an action of removing seems indispensable; and wherever houses in the country have any land, however small, attached to them for agricultural purposes, especially if let on lease, an action of removing cannot safely be dispensed with if the tenant has not granted an obligation to remove.

5. "Solemn" removings are not necessary for houses, even when in the country, and having gardens and ornamental grounds attached to them. Forty days' warning, which may be given by registered letter, or may be verbal if satisfactorily proved, must, however, be given to the tenant, after which he may be ejected on petition to the Sheriff. The question of value is immaterial, since it does not govern the matter, and because an expired lease can raise no stronger presumption in favour of tacit relocation than a tenure under verbal agreement. It is in the landlord's option to raise a formal action of removing, the expenses of which fall on himself. Within burgh, removings are conducted according to local custom; but by the Terms Removal Act of 1886, the term days within burgh are the same as those for the country, the provision for warning already noticed being applicable.

6. Removings from houses and other heritable subjects let for less than a year and under £30 rent are conducted, under the Act of 1838, in the same way as proceedings in the Small Debt Court, with the distinction that the Sheriff, in the absence of the defender, must proceed as though he had appeared, and that the defender, if he appear before the decree has been carried into execution, may obtain a further hearing upon payment of such expenses as the Sheriff deems just. The decree is final. If the defender, however, appear and find caution for violent profits, the case must be conducted in the ordinary manner, and the Sheriff has power to order answers, in which case the action goes to the ordinary roll, and if the defence be not instantly verified, the defender must find caution for violent profits. This was the process of summary removing (more properly called summary ejection), and applied only to short

lets where the rent did not exceed £30 a year. The Act of 1907 makes the procedure applicable to all short lets, irrespective of the amount of the rent.

### II. THE ACT OF 1907

### I. Ordinary Removings

**1. Scope of Act.**—The Act of 1907 has effected considerable alterations and amendments of the law. It deals, however, only with "ordinary" removings—solemn and summary—that is those which occur at the natural termination of the tenant's rights. Extraordinary removings, that is those which occur during the currency of a lease by a legal or conventional irritancy, remain uneffected by the Act, and "ordinary" removings are still competent on the procedure formerly in use. "Ordinary" removings, again, were formerly divided into "solemn," that is those in which forty days' warning was required; and "summary," or those in which a less formal procedure was necessary. With regard to "solemn" removings, the principal effect of the Act is (1) to define certain cases in which no process of removing or ejection is necessary; (2) to define those cases in which a "solemn" removing, that is, action at least forty days before the termination of the tenancy, is unnecessary; and (3) to provide rules as to the requisite notices, and as to procedure in all actions of removing.

**2. Ejection without any process of Removing or Ejection.**—In the case of lands exceeding two acres in extent (that being the distinguishing limit introduced by the Act)—

(*a*) Where there is a probative[1] lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, the lease, or an extract of it from the books of any Court of Record, has the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right; and the lease or extract, along with the written authority of the lessor or any one in his right, or his factor or law agent, is a sufficient warrant to any Sheriff-officer or messenger-at-arms of the Sheriffdom within

[1] A written lease that is not probative cannot be a warrant for summary ejection, though it is valid if followed by possession and *rei interventus*.

which the lands are situated to eject the party in possession, his family, sub-tenants and dependents, with their goods, gear, and effects, at the expiry of the term or terms of endurance of the lease.[1]

(*b*) Where the tenant in possession of the lands, whether he possesses a written lease or not, has at any time granted a letter of removal, either holograph or tested by one witness, such letter has the same force and effect as an extract decree of removing, and is a sufficient warrant of ejection, and is operative against the granter, or any one in his right, within the same time and to the same effect as in the previous case.[2]

In each of these cases previous notice[3] in writing to remove must be given: (*a*) When the lease is for three years and upwards, the notice must not be less than one year and not more than two years before the termination of the lease; (*b*) in leases from year to year (including lands occupied by tacit relocation), or for any period less than three years, the notice must be not less than six months before the termination of the lease (or, where there is a separate ish, as regards lands and houses or otherwise) before that ish which is first in date.[4] In the second of these cases, if the letter of removal is dated and signed within twelve months before the date of removal, or before the first ish if there be more than one, no notice of any kind need be given by the one party to the other.[5] If the provided notice in writing to remove be not given, then the lease is held to be renewed by tacit relocation for another year, and thereafter from year to year. These provisions with regard to probative leases do not affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy Act of 1856, or against whom decree of cessio has been pronounced under the Debtors' Act of 1880, or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal. And removal or ejectment in virtue of these provisions applying to probative leases is not competent after six weeks from the date of the ish last in date. The provisions as to notice do not apply to stipulations in the lease as to resuming land, nor to subjects let for less than a year. Finally, the provisions of section 34 relating to lands held under a probative lease

[1] Act, s. 34; *cf.* Act of 1853, s. 30.

[2] Act, s. 35: *cf.* Act, 1853, s. 31.

[3] Form H., Rule 111.

[4] Act, s. 34, proviso B; *cf.* Agricultural Holdings Act, 1883, s. 28.

[5] Act, s. 35, proviso.

do not exclude proceedings under any lease in the common form in use prior to the passing of the Act.[1]

**3. Ejection without Action of Removing: Summary Ejection.**—(1) Where lands exceeding two acres in extent are occupied by a tenant without any written lease, and the tenant has given to the proprietor or his agent no letter of removal, the tenancy may be terminated on written notice on either side, given not less than six months before the determination of the tenancy. If the tenant fail to remove after receipt of such notice, the proprietor may apply for and obtain a summary warrant of ejection against the tenant and every one deriving right from him.[2]

(2) The following subjects when let for a year or more: (*a*) houses, with or without land attached, not exceeding two acres in extent; (*b*) lands not exceeding two acres in extent, let without houses; (*c*) mills; (*d*) fishings; (*e*) shootings; and (*f*) all other heritable subjects (except land exceeding two acres in extent). In this case notice of the termination of the tenancy must be given in writing, either by the proprietor or the tenant, or any one acting on their behalf, at least forty days before the 15th May or 11th November, as the case may be, for the Whitsunday and Martinmas terms respectively. It is not necessary that warning should be given on the premises, provided it be made to the party, either by personal service or at his dwelling-house. Therefore warning to the tenant of a house and shop (separate subjects), given in the shop where the tenant resided, was held good with regard to both.[3] Such notice does not warrant summary ejection of the tenant from the subjects let, but whether given to or by the tenant, entitles the proprietor to apply to the Sheriff for a warrant for summary ejection in common form against the tenant and every one deriving right from him.[4]

(3) Houses or other heritable subjects let for a shorter period than a year, in which case any person authorised by law may present to the Sheriff a summary application for removing, a decree in which has the force and effect of a decree of removing and warrant of ejection. If the subjects are let for a period not exceeding four

[1] Act, ss. 34, 35; Act, 1853, ss. 30, 31; Agricultural Holdings Act, 1883, s. 28.

[2] Act, s. 36. This case was not provided for at all either by the A. S. of 1756 or the Act of 1853. The period of warning is that applicable to short leases under sec. 34, proviso B.

[3] Scott *v.* Cook, 1886, 24 S.L.R. 34.

[4] Act, s. 37; Removal Terms Acts of 1886 and 1890. *But see* note, p. 516.

months, a notice of removal equal to one-third of the whole period of the let must be given: if the let exceeds four months, a notice of removal must, in the absence of express stipulation, be given at least forty days before the expiry of the period.[1] This is known as a summary removal under the Act, though the term summary ejectment would be more appropriate. The form of writ must be in Form K annexed to the Act.[2] The action is competent at the instance of the proprietor, his factor, or any other person authorised by law to pursue a process of removing.[3] The removal notices required by the Act may be given by (*a*) a messenger-at-arms, (*b*) a Sheriff-officer, or (*c*) a registered letter signed by the person entitled to give notice, or by his law agent or factor, posted in any post-office in the United Kingdom in time to admit of its being delivered at the address on it on or prior to the last date upon which by law such notice must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person if at the time it be known, or if not known then to the last known address of such person.[4] A certificate of notice in the form annexed to the Act, by the person giving it, or an acknowledgment of it endorsed on the lease or extract or letter of removal, as the case may be, by the party in possession or his agent, is sufficient evidence of its having been given.[5] When there is no lease, a certificate endorsed upon a copy of the notice or letter, certified to be correct by the person sending it and signed by him, is sufficient.[5] The warrant of service in this form of summary removing or ejectment allows two days' induciæ, and, unlike other warrants containing a shortened induciæ, may be signed by the Sheriff-Clerk.[6] Presumably, however, a witness to the service is necessary.[7] Special authority to cite witnesses is not necessary, and the warrant of service, or the defender's service copy of it, is a sufficient warrant for the citation of witnesses.[8] If the defender fail to appear, the Sheriff may dispose of

[1] Act, s. 38; Act, 1838, s. 8; Removal Terms Act, 1886, s. 6. The Act of 1838 made no provision as to notice. By adopting that required by the Removal Terms Act, 1886, the Act introduces a uniform notice.

[2] Act, Rule 115, Form K.

[3] Act, Rule 115.

[4] Act, Rule 113; Removal Terms Act, 1886, s. 6.

[5] Act, Rule 114.

[6] Act, Rule 116; Act 1838, Sch. A (2).

[7] The Citation Amend. Act, 1871, made the presence of a witness unnecessary in ejections raised under the Small Debt Act. The process is now, however, no longer under the S. D. Act, and therefore a witness appears to be necessary.

[8] Act, Rule 118.

the case in his absence, and in that event may give such directions as he may deem proper for the preservation of the defender's goods and effects.[1] If, however, within three days after decree has been pronounced in absence, the defender is able to satisfy the Sheriff that there was reasonable excuse for his absence, the Sheriff may re-hear the cause, and if the decree has not been implemented, may recall it upon such conditions as to expenses and otherwise as he may deem reasonable.[1] If the defender appears, the cause is conducted and disposed of in the summary manner provided under the Small Debt Acts, and the Sheriff's judgment is not subject to review,[2] even to the limited extent to which review is competent under these Acts. The Sheriff may, however, notwithstanding, order written answers, and he may adjourn the hearing. If the defences cannot be instantly verified, the Sheriff must (not may) ordain the defender to find caution for violent profits (that is, the loss and damage occasioned to the proprietor by the tenant's refusal to quit when requested),[3] unless he dispenses with caution, which he may do if he sees fit.[4] Where the defender has given in answers, and caution for violent profits has either been found or dispensed with, the case is no longer conducted summarily, but, as nearly as may be, according to the procedure applicable to an ordinary action of removing, and subject to review in common form.[5] The ground of the application for a warrant to eject is that the defender has no right or title to occupy the subjects, and is therefore differentiated from an action of removing where the tenant does possess such a title. A decree of removing, as will be seen, is brought under review by suspension and not by appeal, but a summary ejection by appeal. There is no question in such an action of the value of the cause, and therefore the provisions of section 7 of the Act with respect to appeal do not apply.

**4. Actions of removing where Term of Removal fixed: Summary Removings.**—In ordinary "solemn" removings under the old forms of procedure, in lands let for agricultural purposes, the landlord, having given the requisite statutory notice, required to raise an action of removing in such time as to leave an interval of at least forty days between the date of execution and the term of

[1] Act, Rule 117.

[2] Act, Rule 119; Act, 1838, s. 11.

[3] Beresford's Trs. *v.* Gardner, 1877, 4 R. 1091.

[4] Act, Rule 121; Act, 1838, s. 12. Finding caution was under the former Act imperative.

[5] Act, Rule 122; Act, 1838, s. 13.

removal.[1] Under the provisions of the Act of 1907, the action may be raised at any time—(1) if the tenant has bound himself to remove by writing, dated and signed within twelve months of the term of removal; or where there is more than one ish, of the ish first in date to remove: (2) if the tenant has not so bound himself (*a*) in the case of a lease of lands exceeding two acres in extent for three years and upwards, provided an interval of not less than one year nor more than two years elapses between the date of notice of removal and the term of removal first in date: (*b*) in the case of leases of land exceeding two acres in extent, whether such leases be written or verbal, held from year to year or under tacit relocation, or for any other period less than three years, provided an interval of not less than six months elapses between the date of notice of removal and the term of removal first in date: and (*c*) in the case of (i) houses let with or without land attached not exceeding two acres in extent, (ii) of land not exceeding two acres in extent without houses, (iii) mills, (iv) fishings, (v) shootings, and (vi) all other heritable subjects except land exceeding two acres in extent and let for a year or more, provided that forty days at least elapse between the date of notice of removal and the term of removal first in date.[2] The provisions of the section do not affect those of section 27 of the Agricultural Holdings Act of 1883, which provides, in lieu of the landlord's hypothec, that a tenant six months in arrear may be ejected by warrant of Court unless he find caution for arrears and a further year's rent.

*Procedure.*—Actions of irritancy and removing must be raised in the Court of the jurisdiction and district where the property forming the subject in dispute is situated. If the defender enters appearance, he may be ordered to find caution for violent profits.[3] Formerly, unless he could instantly verify his defence, he necessarily required to find caution for violent profits, and if he failed decree was pronounced. Under the provisions of the Act he may be ordered to find caution by the Sheriff, *ex proprio motu*, or on the motion of the pursuer, and if he fails decree may be given against him. He may state any relevant defence, but he cannot dispute the title of the person from whom his own title is derived.[4] A record is made up and the action

[1] A. S. 1756, s. 2, as amended by the Act of 1853, s. 29.

[2] Act, Rule 110; *cf.* Agricultural Holdings Act, 1883, s. 28. *See* note, p. 516.

[3] *See* Beresford's Trs. *v.* Graham, 1877, 4 R. 1091.

[4] Dunlop *v.* Meiklem, 1876, 4 R. 11.

proceeds in the usual way. Section 113 of the Act of Sederunt of 1839 provided that extract of a decree of removing could be issued forty-eight hours after its date. As decrees of removing are reviewed by suspension, the provisions as to extract contained in section 68 of the Court of Session Act, 1868, seem inapplicable. Modification of these provisions was effected by section 32 of the Sheriff Court Act, 1876, which is repealed by the Act of 1907, but these modifications did not seem any more applicable. It would appear that the same observation is pertinent with regard to the provisions of rule 85 of the Act of 1907. For that reason it may be thought that the provisions of the Act of Sederunt of 1839 still apply. It must, however, be remembered that Acts of Sederunt are not in terms repealed, though they may be superseded by later Acts of Sederunt, and that the Statute to which that Act of Sederunt was applicable is itself repealed by the Act of 1907. If the Act of Sederunt be not applicable, then the provisions of rule 85 of the Act apply; as under that rule the Sheriff has power to allow extract at such early date as he may deem expedient, any question may be avoided by obtaining the Sheriff's leave for extract at the expiration of the forty-eight hours. In virtue of the warrant in the decree, the defender may be charged to remove himself, his sub-tenants and dependents and effects, from the subjects at the term therein specified, if the charge be given forty-eight hours prior thereto, or within forty-eight hours of the charge if given later.[1] If the defender fail to obey the charge he may be ejected from and kept furth of the premises. The execution of the decree should be carried out with the least possible delay.[2] Decrees of removing are brought under review by suspension and not by appeal.[3] Appeal is incompetent, since within the usual period allowed for appealing, extract may have gone out and a charge taken place.

**In Actions of Declarator of Irritancy and Removing** by a superior against a vassal, the pursuer must call as parties the last-entered vassal, and such heritable creditors and holders of postponed ground burdens as are disclosed by a search for twenty years prior to the raising of the action, the expenses of the search forming part of

[1] *See* Macdonald *v.* Watson, 1883, 10 R. 1079.

[2] Taylor *v.* E. of Moray, 1892, 19 R. 399.

[3] Court of Session Act, 1825, s. 44: the Court of Session Act of 1868, ss. 64 and 65, does not repeal this; Fletcher *v.* Davidson, 1874, 2 R. 71; Ross *v.* Brims, 1878, 15 S.L.R. 438; nor does the Act of 1907.

the pursuer's expenses in the process.[1] Section 32 of the Act of 1853 made provision for the recovery of arrears of feu-duty in subjects not exceeding £25 in yearly value, by an action in the Sheriff Court in ordinary form, which took the form of a process of removal. The Act of 1907 contains no corresponding provision. The Act, however, expressly extends the jurisdiction of the Sheriff to actions relating to questions of heritable right and title, including all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant.[2] Such actions, therefore, now, in respect that they are included in those relating to heritable right and title, become ordinary actions wholly irrespective of their pecuniary value, and are subject to the same rights of appeal and otherwise as the main category of actions to which they belong. The directions in the Statute relating to the calling of creditors and holders of ground (or real) burdens are not new.

## Summary of Provisions of Act of 1907[3]

### (*a*) LAND EXCEEDING TWO ACRES

1. *Probative Lease*, with or without an obligation to remove: Section 34, Rule 110 (*a*) (*b*).—The lease, or an extract of it, is itself a warrant for summary ejection when taken along with a certificate of notice of removal and letter of authority to eject by the owner or his law agent or factor to the messenger or officer. But (*a*) where the lease is for three years at least, the notice of removal must be given between one and two years before the termination of the lease. Where there are two terms of removal, the notice must be given before the first: (*b*) Where the lease is for one year or less than three years, the notice[4] must be given six months before the termination of the lease, or the first term if there are two terms of removal. The ejection must be effected within six weeks of the termination of the lease. Failure to give notice renews the lease by tacit relocation for one year, the relocation being terminable on six months' notice. The lease ceases, on tacit relocation taking place, to be a warrant for summary ejection, because it does not "specify the term of endurance" of the relocation. The provisions of the

[1] Act, Rule 110.
[2] Act, s. 5 (4).
[3] *See* instructive article by Mr. W. Shaw in 16 S.L.T. (1908), pp. 49–55.
[4] Act, Form H., Rule 111.

Statute are now confined to land exceeding two acres held under a probative lease; formerly, under section 30 of the Sheriff Court Act of 1853, they extended to all heritages.

2. *Letter of Removal*, with or without a written lease: Section 35, Rule 111.—A letter of removal[1] has the effect of a probative lease under section 34, with these differences: (*a*) No notice of removal is required if the letter is dated within one year before the termination of the lease, or of the first term if there are two terms of removal, even when six months' notice is sufficient. (*b*) If ejection is not effected within six weeks after the termination of the lease, and if the letter is dated within one year before the termination of the lease, or the first term if there are two terms of removal, and no notice of removal would be necessary, then rule 111 does not apply. Removal in that case cannot be effected by an action of removal, since notice, or its equivalent, is implied as a condition of that action, and therefore the lease must be held to be renewed for a year by tacit relocation under section 34. The letter of removal is now confined to land exceeding two acres in extent held under a written or verbal lease, but formerly, under section 31 of the Sheriff Court Act, 1853, it extended to all heritages.

3. *Without written Lease or Letter of Removal*: Section 36, Rules 110 (*b*), 111.—In the case of a yearly tenancy, the lease is terminated by the owner or tenant giving six months' notice[2] before the termination of the tenancy, or, where there are two terms, the first term of removal. A notice by the tenant under this section enures for the benefit of the landlord, and a notice by either party entitles the owner to apply for a summary warrant of ejection. Where, therefore, any land of any kind is held on a yearly tenancy without a written lease, and the tenant has not granted a letter of removal, the notice in all cases is six months. This provision alters the common law, and supersedes the provisions of section 28 of the Agricultural Holdings Act of 1883 as regards agricultural, pastoral, or market-garden land.

The land included under sections 34, 35, and 36 of the Act apparently includes buildings on the land.[3]

[1] Act, Form I.

[2] Act, Form H.

[3] Sec. 37 excludes from its operation land exceeding two acres in extent; land exceeding two acres must therefore include the buildings on it, even though the value of such buildings exceed that of the land.

### (*b*) HOUSES WITH OR WITHOUT LAND ATTACHED, NOT EXCEEDING TWO ACRES; LAND NOT EXCEEDING TWO ACRES WITHOUT HOUSES; ALL OTHER HERITABLE SUBJECTS, IF LET FOR A YEAR OR LONGER, BY VERBAL OR WRITTEN LEASE: SECTION 37, RULE 110 (*c*)

In the case of such subjects the tenancy is terminated by the giving of forty days' notice either by the tenant or the landlord.[1] The notice,[2] which entitles the owner to apply for a summary warrant of ejection in common form, must be given forty days at least before the date of the notice of removal and the term of removal first in date, and in the case of the conventional terms, at least forty days before 15th May and 11th November. The operation of the section is confined to "land not exceeding two acres let without houses, etc.," to "houses with or without land not exceeding two acres *attached*," and to all *other* heritable subjects (except land exceeding two acres is extent). As expressed, the words of the section are not clear. What is intended is probably "land not exceeding two acres, whether *with or without* houses, mills, fishings, and shootings"; "houses with or without land not exceeding two acres"; and "all heritable subjects, except land exceeding two acres in extent," let for a year or more. If that be the meaning of the section, then it may be reduced to the simple terms, "all heritable subjects, except land exceeding two acres, let for a year or more." (*But see note on page* 516.)

### (*c*) ACTIONS OF REMOVING: RULE 110

An action of removing is competent at any time, provided the statutory notice be given, and in all cases, whether there be a probative lease or a letter of removal or not. The rule omits the provision, to meet the case of an action brought prior to the date when notice must be given (in which case notice clearly need not be given), incorporated in section 29 of the Sheriff Court Act, 1853, that the action might be raised at any time, provided there was

[1] Agricultural Holdings Act, 1883, s. 28, provided that the notice should be twelve and six months respectively.

[2] Act, Form J; the form, which applies only to Whitsunday and Martinmas, may be adapted to suit any term and date in accordance with the provision of the rule. It should be used by owners and tenants alike: Rule 112.

an interval of at least forty days between the date of the execution of the summons and the term of removal. The rule provides that the action is competent provided the tenant has bound himself by written obligation within twelve months of the term of removal, or the first, if there be two terms, and therefore inferentially that when he has so bound himself no notice of removal is necessary.

### (*d*) HERITABLE SUBJECTS LET FOR LESS THAN A YEAR: SECTION 38, RULES 115–122

This is the process described in the Act as "summary removing," but more properly called "summary ejectment." Under section 8 of the Sheriff Court Act of 1838, the limit of rent in such actions was £30, but under the Act of 1907 that restriction has been removed. By section 5 of the Removal Terms Act, 1886, the process was limited to buildings tenanted for four months. Under the Act of 1907 the tenancy may be for any period short of a year. If the let be for a period not exceeding four months, the notice of removal, apart from special stipulation, is one-third of the period; if exceeding four months, forty days, a condition which is not allowed in lets for a year or upwards. The stipulation may be that no notice shall be necessary, and that the tenant shall remove without warning, in which case if the let be for a specified period, tacit relocation does not operate to renew the let. Where houses or other heritable subjects are let for a fixed period less than a year, on a clear understanding and intention that the let shall terminate at the end of the period, as in the case of a dwelling-house let for the summer season, tacit relocation does not take place, and therefore notice in terms of the Act is unnecessary.

## II. "Extraordinary" Removings

**Removing during currency of Lease.**—In the event of a breach of contract by a tenant, the landlord is entitled to adopt one of two courses, though he cannot adopt both: (*a*) he may claim

damages, or (*b*) if the breach infers an irritancy, either by virtue of the law or of stipulation, he may terminate the lease. Irritancies are either legal or conventional. The legal irritancies are regulated or imposed by the Act of Sederunt of 1756, as amended by the Agricultural Holdings Act of 1883 and the Act of 1907. Where the landlord desires to terminate the lease on the ground that the tenent has incurred an irritancy, legal or conventional, he must in all cases raise an action of removing.

*Legal Irritancies.*—Where the irritancy on which the currency of the lease is interrupted is one incurred by the operation of the law, as distinguished from one incurred by virtue of express stipulation in the lease, it has been said that the Sheriff Court has no jurisdiction to remove, except in such cases as jurisdiction was expressly conferred by the Act of Sederunt of 1756. In considering these cases it is necessary to distinguish between subjects in regard to which the landlord's right of hypothec still subsists, and those in regard to which it has ceased and determined under the Hypothec Abolition Act of 1880, under the provisions of which the landlord's hypothec was abolished for the rent of any land, including that of the buildings upon it, exceeding two acres in extent, let for agricultural purposes or for pasture, under any bargain which was current at 11th November 1881. The legal irritancies are three in number, the first two of which were enacted by the Act of Sederunt of 1756, and the last by the Agricultural Holdings Act of 1883, which remains unaffected, under rule 110, by the Act of 1907. The Act of Sederunt of 1756 applies only to leases of agricultural and pastoral lands, and not to mines, collieries, fisheries, or urban subjects. The first of the irritancies introduced by the Act of Sederunt is that incurred by the tenant allowing his rent to fall into arrears for two full years, in which case the landlord may have the irritancy declared before the Sheriff and the tenant summarily removed. For this irritancy a removal is competent, whether the hypothec has ceased or not.[1] The writ concludes for declarator of the occurrence of the irritancy and for removal of the tenant, and the action proceeds like an ordinary removing.[2] The

[1] Agricultural Holdings Act, 1883, s. 27.

[2] The Sheriff Court Act of 1853 made provision for the case of the lease being over 21 years' duration, and the annual value of the subjects being under £25. As that Act is repealed it seems unnecessary to say more.

second irritancy under the Act of Sederunt occurs where a tenant allows his rent to fall one full year in arrear, or deserts his possession or leaves it unlaboured at the usual period of tilling. Proceedings under this irritancy are competent where the hypothec exists, and, where it has ceased, in those cases in which a removing for non-payment of rent is not competent under the provisions of the Agricultural Holdings Act of 1883, to be noticed shortly. Where thus competent, the landlord may, in any of the three events named, bring an action calling on the tenant to find caution for the arrears, and for the rent for the five crops following, or till the end of the lease, if it terminates sooner. Thus, where the tenant flees the country after becoming bankrupt, and leaves his farm displenished and abandoned, caution must be found on peril of removing. If, however, the landlord has himself something to prove in order to establish a title to sue, both parties are *in pari casu*, and caution cannot be demanded.[1] If the amount of a year's rent be due, it is immaterial whether it be the rent of a single crop or made up of portions of the rents of several years. The landlord is not bound to accept partial payments, and debts of the landlord, or even public burdens, paid by the tenant without authority are not computed so as to diminish the rent due. In construing the Act relatively to desertion, or leaving the ground unlaboured, the leaning has been in favour of the tenant. The third ground of irritancy is that provided by section 27 of the Agricultural Holdings Act of 1883, as to the provisions of which rule 110 of the Act of 1907 provides that nothing therein contained shall affect them. That section of the Act provides that in any case in which the landlord's right of hypothec for the rent has ceased and determined, when six months' rent of the holding is due and unpaid, it shall be lawful for the landlord to raise an action of removing before the Sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid, or caution is found to the satisfaction of the Sheriff for the same and for one year's rent further, the Sheriff may decern the tenant to remove, and eject him at such term in the same manner as if the lease were determined and the tenant had been legally warned to remove. A tenant so removed has the rights of an outgoing tenant, to which he would

[1] Oliver *v.* Weir's Trs., 1870, 8 M. 786; *see* Act, Rule 110, proviso A.

have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas. In cases where the procedure under this enactment is competent, the provisions of section 5 of the Act of Sederunt of 1756, just noticed, do not apply. The effect of this enactment, taken along with the provisions of the Act of Sederunt, is, says a competent authority,[1] that the latter is left untouched as the sole rule in regard to legal irritancies under farm leases current at the commencement of the Hypothec Abolition Act of 1880 (which contained provisions which are superseded and repealed by the above section of the Act of 1883); and that in respect of leases not then current the section of the Act of Sederunt, which provides for irritancy on arrears of rent for two years, is still a competent remedy, though in most cases its operation will be anticipated by a resort to the modern remedy, which if and when it applies—(1) supersedes section 5 of the Act of Sederunt; (2) gives an earlier recourse to the Sheriff; and, on the other hand, (3) safeguards the tenant against confiscation of improvements, etc., and against removal between terms; and (4) withholds the remedy of caution and removing from a landlord who finds his holding deserted or unlaboured.

*Conventional irritancies* are the result of stipulations contained in the lease. Such irritancies necessarily vary according to the views of the contracting parties, but any reasonable stipulation, not involving gross abuse or oppression, will be given effect to by the Court.[2] The usual irritancies are: (1) For non-payment of rent, that is if one whole year's rent remain unpaid after the term of payment specified, or if two years' rent be allowed to run into the third unpaid, in regard to which it is now settled that the irritancy is constituted by two years' rent remaining unpaid; (2) the bankruptcy of the tenant; (3) his non-residence[3]; (4) assigning or sub-letting; or (5) not possessing the farm with his own stocking, which, however, has not been strictly construed. Where the irritancy is conventional, the Sheriff may remove the tenant, because in that case the irritancy brings the lease to an end in precisely the same way as if the number of years specified for its duration had expired.

[1] Rankine on Leases, p. 461.

[2] Stewart *v.* Watson, 1864, 2 M. 1414; Mags. of Glasgow *v.* Hay and Others, 1883, 10 R. 635; *but see* Wyllie *v.* Herit. Secs. Inr. Ass., 1871, 10 M. 253; Scot. Propy. Inv. Co. *v.* Horne, 1881, 8 R. 737.

[3] *See* Edmond *v.* Reid, 1871, 9 M. 782.

An attempt has been made to draw a distinction between irritancies which are fair conditions of a lease and those which are penal, with the object of founding in the case of the latter a denial of the Sheriff's jurisdiction. The distinction, however, is non-existent, since every irritancy runs the risk of being penal, and it is barren, since the question cannot be decided at the outset of a suit.[1]

*Purging of Irritancy.*—A conventional irritancy, so long as it is not a mere copy of a legal irritancy, once it is incurred cannot be purged by payment of the arrears of rent (where arrear is the cause of forfeiture), or cesser of the status or diligence or other fact on which the landlord founds, though the Court may step in to prevent the misuse of an irritancy or to prevent gross abuse or oppression.[2]

## V. Ejection

The term ejection may be applied to the procedure by which an action of removing is carried into effect, or to an independent action.

**Ejection following Action of Removing.**—The decree in the action of removing orders the defender to remove, and, failing his doing so on being charged, grants warrant to the officers of Court to eject him and his, the officers having power for that purpose to open shut and lockfast places and to remove all the tenant's goods and effects from the premises, using all requisite force for that purpose. In all ejections, other than summary,[3] a charge of forty-eight hours is necessary; in summary ejections, the time for charge, if any, is fixed in the decree. As has been seen, the only competent mode of obtaining a review of a decree of removing or ejection, or of putting a stop to the execution of such a decree by charge or threatened ejection, is suspension in the Bill Chamber and Court of Session. Appeal is incompetent.[4]

**Summary Ejection.**—The process of summary ejection applies only where the title of the occupier is precarious or vitious,—either where the person proceeded against never had a title at all, or where,

[1] Rankine on Leases, 471.

[2] Stewart *v.* Watson, 1864, 2 M. 1414; Lyon *v.* Irvine, 1874, 1 R. 512; Hannan *v.* Henderson, 1879, 7 R. 380.

[3] That is "summary ejections," not "summary removings," or, in other words, those to which the Act of 1838 and section 38 of the Act of 1907 apply.

[4] 6 Geo. IV. c. 120, s. 44; Fletcher *v.* Davidson, 1874, 2 R. 71.

having had a title, it has been brought to an end by a competent Court, or in some competent manner. So, where it was matter of dispute between the owners of a house and the occupier whether his title to occupy (the original validity of which was admitted) had been brought to an end, the Court refused the remedy of ejection.[1] The proceedings in the action are similar to those in an action of removing, except that no charge is given on the decree. It is of the essence of the action that it contain an averment that the possession of the respondent is vitious or precarious without any title.[2] Appeal, and not suspension, is the proper mode of review where the defender is possessing without a title, and is therefore not in the position of a tenant.[3] The irritancy incurred where the tenant does not stock his farm is the only one occurring in practice which warrants a summary removal, and it has been said that it cannot be enforced in the Sheriff Court. The Sheriff can pronounce a decree ordaining the tenant to stock his farm within a fixed period, but it has been held he cannot carry out his decree by removing the tenant if he fail to obey it.[4] Under the provisions of section 5 of the Heritable Securities Act of 1894, a creditor who desires to enter into possession of lands disponed in security, the proprietor of which is in personal occupation of them or any part of them, may take proceedings to eject the proprietor in the same way as if such proprietor were an occupant without a title, if there has been default in the punctual payment of the interest due under the security, or in due payment of the principal, after formal requisition. Summary ejection is also competent under the Small Debt Acts, where after a decree for rent obtained in that Court the tenant fails to plenish the subjects.

[1] Gibson & Son *v.* Gibson, 1899, 36 S.L.R. 522.

[2] Hally *v.* Lang, 1867, 5 M. 951; Scot. Propy. Invt. Co. *v.* Horne, 1881, 8 R. 737.

[3] Clark *v.* Clarkes, 1890, 17 R. 1064; Barbour *v.* Chalmers, 1891, 18 R. 610; Robb *v.* Brearton, 1895, 22 R. 885.

[4] Macdonald *v.* Mackessack, 1888, 16 R. 168; *see* Ld. Young's opinion.

NOTE.—*Section* 18 *of the Agricultural Holdings Act of* 1908, *which came into operation on* 1*st January* 1909, *restores agricultural, pastoral, and market garden land, not exceeding two acres in extent, to the position which it held under section* 28 *of the Agricultural Holdings Act of* 1883, *replacing it with regard to the period of notice in the same position as land exceeding two acres in extent. Section* 37 *and Rule* 110 (c) *of the Sheriff Courts Act of* 1907 *do not therefore now apply to such land, with regard to which the notice, instead of being forty days, must now again be twelve months in the case of a three years' tenancy, and six months in the case of a tenancy over one and under three years. The benefit of summary ejection under the section and rule is not, however, lost if such notice be given.* (See 1 S. L. T. p. 47.)

# CHAPTER XXX

## ACTIONS CONNECTED WITH ENTAILED ESTATES, ACTIONS OF POINDING OF THE GROUND, OF SEQUESTRATION FOR RENT, AND APPLICATIONS UNDER THE HERITABLE SECURITIES ACT, 1894

### I. Actions connected with Entailed Estates


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**Proceedings Competent.**—The proceedings competent in the Sheriff Court with reference to entailed estates embrace those which petition for authority—(1) to feu for building purposes under the Entail Amendment Act of 1868; (2) to feu for churches, schools, and other purposes under the Act of 1840, and for scientific purposes under the Act of 1882; (3) to lease under any of the various entail Acts; (4) to charge with improvement expenditure of all kinds, and (5) to excamb portions of lands under 300 acres in extent. Petitions to entail or disentail, to sell, to charge with provisions or debts for other than improvement purposes, or to uplift and apply or acquire consigned money or money held in trust, are competent only in the Court of Session. Where in an application in the Sheriff Court defences to the competency of the proceedings are lodged, the objections should be disposed of in the ordinary way upon a closed record before the merits are entered upon.

**Feuing under Act of 1868.**—The Entail Amendment Act of

1868 gives power to heirs of entail in possession to grant building feus or dispositions under reservation of a ground-annual of certain parts of the entailed estates, which power may be exercised notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament.[1] In every case in which authority to feu or grant leases is granted to the heir in possession of an entailed estate, such authority is available to the succeeding heirs,[2] but it is doubtful whether the application can be made in the Sheriff Court where the heir in possession is a minor or subject to legal incapacity.[3] If, however, the heir in possession has been absent from Scotland or has disappeared for any shorter period than fourteen years, and a factor *loco absentis* has been appointed under the Presumption of Life Limitation Act of 1881 or otherwise, such factor may apply to the Sheriff for authority to feu in the same manner as the heir in possession himself might have done.[4]

*Conditions on which Feuing Competent.* — Subject to the limitations afterwards explained, any entailed lands may be feued, but dispositions on payment of a ground-annual are competent only when the estate is held by burgage tenure. The annual payment must in every case be fair and adequate, and no grassum, fine, or consideration of any kind, except the annual payment, must be taken. Under the Conveyancing Act of 1874, even the nominal casualty of one penny on the entry of an heir or singular successor which the Act of 1868 permitted, can not now be exacted.[5] The contract, whether feu-charter, lease, or disposition, must contain such conditions as the Sheriff thinks essential for securing the annual payment, and a condition that buildings of the annual value of at least double the annual payment be erected within five years of its date, and thereafter kept in good tenantable and sufficient repair.[6] The contract must further contain any other conditions to which the Sheriff may see fit to subject it. The Act declares that if any fine be taken, or that if buildings be not erected and kept in repair as required, the contract shall be null and void.[7]

[1] Entail Amendment Act of 1868, s. 3.

[2] Entail (Scotland) Act, 1882, s. 6 (3).

[3] *Ibid.*, s. 11.

[4] *Ibid.*, s. 14.

[5] Conveyancing Act, 1874, s. 23.

[6] The stipulation must be for buildings to be erected in the future; buildings already erected cannot be taken as an equivalent; Stewart *v.* Murdoch, 1882, 9 R. 458.

[7] Entail Amendment Act, 1868, ss. 3, 4, 5.

*Lands which may be Feued.*—The lands thus to be feued or disponed may consist of any part of the entailed estate excepting the garden, orchards, policies, or enclosures adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place.[1] Minerals and the right of working the same are specially reserved from the power to feu or dispone[1]; under leases they are reserved by law.

*Mode of obtaining authority to Feu.*—The heir in possession obtains authority to feu or dispone in this way by presenting an application to the Sheriff of the county within which the entailed estate, or the part proposed to be dealt with, is situated. No form for this petition is prescribed, but in accordance with the provisions of the Act of 1907 it will now be presented in the form of initial writ prescribed by that Act. The crave may be (1) for an order to intimate to the next heir, (2) for a remit to persons of skill (whose names should not be suggested) to examine and report, and (3) for authority to feu or dispone (adopting the phraseology of the Act and selecting the alternative desired) the specified lands on the conditions set forth. The condescendence, in the event of defences being lodged, refers to the Act and describes the lands proposed to be dealt with, the petitioner's title to them, the name and designation of the next heir, the conditions on which it is proposed to feu or dispone, and the annual payment which is contemplated. Notice of the application must be given to the next heir of entail in such manner as the Sheriff shall deem proper. If the next heir be under age or subject to any legal incapacity, the Sheriff appoints a tutor or curator *ad litem* to attend to his interests, and as such interests may be opposed to those of the petitioner, care must be taken to ensure that no one is appointed who is either suggested by or connected with the petitioner or his agents.[2] A remit is then made to one or more skilled persons to inquire and report (1) as to the value of the lands proposed to be dealt with, and (2) whether, from their position or otherwise, they may or ought to be so dealt with in terms of the Act, either in whole or in lots. If the report bears that in the opinion of the reporters the annual payment intended is, having regard to all the circumstances, fair and adequate, and that the lands may from their position be dealt with in terms of the Act, either in whole or in lots, the Sheriff, in consideration of

[1] Entail Amendment Act, 1868, s. 3. [2] *See* Stewart *v.* Murdoch, *sup.*

the whole circumstances, may grant the required authority. The Sheriff's deliverance authorises the heir in possession or his successors in the entailed estate, at any time within ten years from its date, to feu or dispone the lands in one or more lots, at such rate of annual payment as can be obtained, not being less than that fixed by the reporters. The deliverance must specially subject the right to feu or dispone to the conditions which the Sheriff thinks essential for securing the annual payment; and in the event of his seeing fit to adject other conditions, the deliverance must specify them. The deliverance concludes by giving authority to grant such feu-charters or dispositions as may be necessary. A model feu-charter may be approved of, and the deliverance gives a continuing power which may be exercised during the ensuing ten years without any further resort to the Sheriff for his approval of the particular bargain.

*Appeal against Sheriff's Deliverance.*—The deliverance of the Sheriff is subject to the review only of the Supreme Court, by a note of appeal to one or other of the Divisions of the Court, where it is disposed of summarily. The note of the appeal must be lodged with the Clerk of the Division, and written notice of it must be given to the opposite party, or his known agent, or lodged with the Sheriff-Clerk within six months of the date of the decree, otherwise the decree becomes final and conclusive. There is no appeal from the judgment of the Court of Session.

*Recording Feu-Charters, etc.* — The feu-charter or disposition, on being executed, must be recorded in the Register of Sasines, and from the date of its recording is effectual to all intents and purposes, and so long as it remains in force, taking the lands conveyed out of the entail, and as a substitute leaving under the entail the superiority of the lands and the annual payment.

**Feuing under Acts of 1840 and 1882.**—As the powers to feu, lease, or dispone conferred by the Entail Amendment Act of 1868 are not hampered by any conditions as to the purposes for which the proposed buildings are intended, the provisions of that Act practically supersede those of any Statutes giving powers to feu for special purposes, although, since such Statutes also authorise proceedings in the Sheriff Court, they are sometimes useful. Thus the Act of 1840 provides for the feuing of lands, with the authority of the Sheriff, for places of public Christian worship, schools, burying-

grounds, play-grounds, and dwelling-houses and gardens for ministers and schoolmasters, for such feu-duty (though inadequate) as may be agreed on. As, however, the proceedings are not often necessary, and are fully explained in the Act, reference to it seems sufficient. Similarly, under the Act of 1882, power is given to feu a portion of land, not exceeding two acres in extent, for scientific purposes or other purposes of public utility. The conditions are specified in the Act, and the procedure is taken under the Act of 1868.

**Leasing entailed Lands.**—The Act of 1868 gives authority to the Sheriff to authorise leases for ninety-nine years in the same way and under the same conditions as it authorises him to sanction feus. The Acts of 1840 and 1882, just referred to, also deal with leases, but under the provisions of section 6 of the latter Act a general power is given to make in the Sheriff Court any application whatever for authority to grant leases which is competent under any of the Entail Acts. As the heir in possession may let any part of the lands at a fair rent for any period not exceeding twenty-one years, and may let minerals for any period not exceeding thirty-one years, without authority other than his own, the general power thus conferred by the Act of 1882 must apply to leases of extraordinary duration. The leases, then, dealt with would appear to be those competent under the Montgomery Act for building purposes in the case of land not exceeding five acres,[1] and those under the Rutherford Act.[2] All applications brought under this provision must be made and disposed of, as nearly as may be, in the same way as if they were applications to the Sheriff for authority to feu under the Act of 1868, and the provisions as to appeal are the same.[3]

**Applications concerning Improvements.**—Prior to 1882 the only provisions in regard to constituting the cost of improvements as a charge against an entailed estate, which were competent in the Sheriff Court, were those contained in the Montgomery Act of 1770. The Entail Act of 1882, by which the former procedure was superseded, made competent in the Sheriff Court applications for charging improvements under the Entail Act of 1875, as amended by the Entail Act of 1878. These provisions, which are applicable to old

[1] 10 Geo. III., c. 51, ss. 4, 5.
[2] 11 & 12 Vict. c. 36.
[3] Entail Act, 1882, s. 5. The Act provides, what in the Act of 1868 was left to inference, that there is no appeal from Sheriff-Substitute to Sheriff.

and new entails alike, are preferable to those of the Montgomery Act, inasmuch as they include every kind of permanent improvement, are not limited to any particular number of years' rent, and are applicable to prospective as well as to past expenditure.[1] Applications under the Acts of 1875 and 1878 for authority to borrow and charge for improvement expenditure are made as nearly as possible, in so far as concerns the procedure with regard to notice and inquiry, in the same way as applications for authority to feu under the Act of 1868.[2] If the improvements have already been made, the Sheriff must be satisfied that they are of a substantial nature, and, as at the date of the application, beneficial to the estate to at least the extent of the sum authorised to be borrowed. The amount of the expenditure must be instructed by such evidence as the Sheriff deems reasonable. The vouchers need not, however, be produced in Court, though the Sheriff, or the reporter appointed to inquire into the facts and examine the improvements, may call for them if he thinks fit. In fixing the amount to be borrowed, the cost of the application and proceedings, and of obtaining the loan and granting security, are added. The proceedings in the case of past expenditure terminate with the granting of authority.[3] In the case of improvements not yet executed the Sheriff, upon being satisfied that when executed they will be of a substantial nature and beneficial to the estate, determines, upon the estimate of one or more persons of skill, the amount to be borrowed. He then grants the authority, but provides that the money paid by the lender shall be lodged in bank, on a receipt payable to the order of the Court, and to be drawn out from time to time to meet the expenditure. The Sheriff makes orders for the due inspection of the works and for their payment, in so far as they have been executed satisfactorily.[4] The amount which may be borrowed is the same in either case. The whole sum expended may be borrowed, if the borrower can make an agreement to repay it by an annual rent during a period not exceeding twenty-five years and at a rate of interest not exceeding £7, 2s. per cent.[5]

[1] Entail Act, 1882, s. 5 ; Entail Act, 1875, ss. 7, 8 ; Entail Act, 1878, ss. 3, 4. Under section 7 of the Act of 1875, the expenditure must not be of older date than twenty years. The effect of section 4 of the Act of 1882 is to abolish any difference as regards improvement expenditure between entails made before and after 1st August 1848.

[2] Act of 1882, s. 5.

[3] Entail Act, 1875, s. 7.

[4] *Ibid.*, s. 7.

[5] *Ibid.*, s. 8.

If this agreement is not made, three-fourths of the amount may be borrowed upon a bond and disposition in security.[1]

**Excambion of Entailed Lands.**—The proprietors of entailed lands may make exchanges of small parcels of their lands with the neighbouring proprietors. The quantity of land exchanged must not exceed 300 acres lying together in one place or plot[2]; and an equivalent in land contiguous to the entailed estate must be received in exchange. The value of the land is ascertained on the proprietor of the entailed estate presenting an application for that purpose to the Sheriff of the county in which the estate is situated. On this application the Sheriff appoints two or more skilled persons to inspect the lands and settle the marches thereof, and to report, upon oath, whether the exchange will be just and equal. If the report be in the affirmative, the Sheriff authorises the exchange to be made by contract of excambion, and on the contract being executed and recorded in the Sheriff Court books within three months from the date of execution, the land added to the entailed estate becomes subject to the entail, the portion exchanged becoming unentailed.[3]

## II. Poinding of the Ground


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**Nature of Action.**—Poinding of the ground is the diligence or action of execution whereby a creditor in a *debitum fundi*, such as a heritable security or a feu-duty, attaches the moveable effects which are on the subjects of his security so as to make them available for payment of his debt, principal and interest, or arrears of interest. The action, which is resorted to only in the comparatively rare event of the subjects of security proving of less value than the amount secured, is competent to a superior for his feu-duties, to an annual-renter for the arrears of his interest, to a heritable creditor, and in general to all creditors in heritable bonds or debts which constitute a real burden or lien on lands.

[1] Entail Act, 1882, s. 6 (1).
[2] Entail Act, 1868, s. 14.
[3] Montgomery Act, 10 Geo. III. c. 51, ss. 32, 33.

**When Competent.**—To found the action the debt must be due by the owner of the heritage, though the fact that he is not feudally invested will not *per se* make the action incompetent.[1] But though the debt must be heritable, and as such duly complete before diligence is used,[2] the immediate creditor's title to it need not itself be heritably completed; his title may be only personal, as that of an assignee to a heritable bond, or that of an executor to arrears of interest or feu-duties. Thus an assignee and disponee to a heritable bond on which sasine had been taken, though not himself infeft in the conveyance in his favour, was found entitled to pursue a poinding of the ground.[3] But when a pursuer had conveyed the superiority to a third party, he was held not entitled thereafter to poind the ground for arrears of feu-duties.[4] The action is not, however, competent to proprietors, or even to creditors or others in possession of the ground, an action of maills and duties being in such cases the appropriate remedy for recovering the debts due by the tenants in the natural possession of the subjects. Thus an absolute disponee cannot competently poind the ground, because in virtue of his title he may enter into natural possession. And similarly, a creditor who holds an *ex facie* absolute disposition, though qualified by a back letter, is in the position of a proprietor and therefore cannot raise the action.[5] And the creditor in a bond and assignation of a ninety-nine years' lease, duly recorded in terms of section 4 of the Registration of Leases (Scotland) Act, 1857, is not entitled to poind the ground.[6] On the other hand, the action is competent to creditors whose title is not equivalent to that of a proprietor, but who are mere encumbrancers. Hence a creditor under a bond and disposition in security, who is in possession under a decree of maills and duties, is not thereby precluded from also raising an action of poinding of the ground.[7] The action is competent in security for interest current, but not yet due, though payment cannot be demanded until the arrival of the term,[8] and it

[1] Mackenzie Trs. *v.* Smith, 1883, 20 S.L.R. 351.

[2] *See* Hardie *v.* Horn, 1888, 4 S.L. Rev. (Sh. Ct.) 409.

[3] Tweedie *v.* Beattie, 1836, 14 S. 337.

[4] Scot. Heritages Co. *v.* N. B. Investment, etc., Co., 1885, 12 R. 550.

[5] Scot. Herit. Secry. Co. *v.* Allen, 1876, 3 R. 333.

[6] Luke *v.* Wallace, 1896, 23 R. 634.

[7] Henderson *v.* Wallace, 1875, 2 R. 272; *see also* Scot. Union and Nat. Ins. Co. *v.* James, 1886, 13 R. 928.

[8] Stewart *v.* Gibson's Trs., 1880, 8 R. 270.

may be raised by a postponed bond-holder.[1] The moveable effects which are sought to be attached must be actually on the subjects of security.[2] Moveables left on the ground by a debtor whom a creditor has put out of possession are secured without further diligence. By poinding the ground the moveable goods of tenants are secured to the extent only of rents unpaid by them.[3] But moveables belonging to a third party which happen to be on the ground or in the debtor's possession are not attached by the diligence:[4] though the mere fact that moveables belonging to a third party have been erroneously included in the poinding does not entitle him to damages.[5]

**Procedure.**—The procedure in the action is, with the exception of certain minor points of divergence, substantially the same as in an ordinary petitory action. In the action, not only the tenants but the proprietors must be made parties. As the object of the diligence is to make the moveables on the ground available for payment of the debt, there is no personal conclusion against the defender, save for expenses, and therefore no charge is necessary. The crave concludes for warrant to poind the goods or other moveables upon the ground, under the restriction that goods of tenants or occupants shall not be taken to the value of more than the rent or other prestations due by them. As the action partakes of the nature of a diligence, execution of the writ should be made by an officer of Court in preference to posting. Since the mere service of the writ creates a *nexus* of the effects, a warrant to inventory the effects appears to be competent on presentation of the writ; and indeed to refuse the warrant until decree has been obtained would be improper. The inventory, whenever granted, is carried out in the same way as in an ordinary poinding. Service of the writ creates a *nexus* on the effects poinded, so that the debtor cannot dispose of them, and any person taking them in the knowledge of the diligence acquires no right even though value has been given,[6] though the citation of a tenant is not equivalent to intimation of an assignation of the rents

[1] Young's Trs. *v.* Hill's Trs., 1893, 1 S.L.T. 357 (O.H.).

[2] Urquhart *v.* MacLeod's Trs., 1883, 10 R. 991.

[3] Act, 1469, c. 36; Campbell's Trs. *v.* Paul, 1835, 13 S. 237; Brown *v.* Scott, 1859, 22 D. 273.

[4] Thomson *v.* Scoular, 1882, 9 R. 430; Nelmes *v.* Gillies, 1883, 10 R. 890.

[5] Nelmes *v.* Gillies, *sup.*

[6] Lyons *v.* Anderson, 1880, 8 R. 24.

so as to interpel him from paying subsequent rents to the landlord as they fall due.[1] When decree is granted, the warrant is executed without any previous charge against the tenants to make payment; for, since there is no decree against the tenants there can be no warrant for a charge.[2] The warrant is carried out by poinding, followed after a lapse of fifteen days by sale, as in the case of effects poinded under an ordinary decree. When the action is defended a record is made up in the usual way. On decree being pronounced, the extract is a sufficient warrant to poind, without other precept or authority.

**Effect of Decree.**—The effect of the diligence is to give the user a right to the rents of the security subjects, though he cannot by virtue of it assume the natural possession of the lands. In a competition the superior poinding the ground for unpaid feu-duties and casualties is preferred; but a collector of poor-rates is preferable to any poinding creditor.[3] Poinding creditors are preferable *inter se*, not according to priority of poinding, but to priority of infeftment, and if the infeftments be of the same date, according to priority of citation. The security which a heritable creditor holds over moveables is of exactly the same nature and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor, therefore, in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his: but it is a preference which ranks with the preferences of other heritable creditors according to the priority of the dates of the creditor's titles.[4]

**In Competition with Trustee in Sequestration.** — At common law, in a competition with the trustee, heritable creditors who have not used poinding of the ground have no preference over moveables found on the ground[5]; but the mere execution of the writ, even after sequestration, if before confirmation of the trustee, secures to the poinding creditor a preference over the whole moveables on the

[1] Royal Bank *v.* Dixon, 1868, 6 M. 995; *but see* Lang *v.* Hyslop & Co., 1854, 16 D. 908.

[2] Kennedy *v.* Buik, 1852, 14 D. 513; *see* per Ld. Medwyn.

[3] N. B. Propy. Invest. Co. *v.* Paterson, 1888, 15 R. 885.

[4] Atholl Hydro. Co. *v.* Scot. Prov. Ass. Co., 1886, 13 R. 818, *per* Ld. Pres. Inglis.

[5] Hay *v.* Hay's Tr., 1826, 2 W. & S. 71.

ground to the full extent of his debt, principal and interest.[1] This preference, being deemed oppressive to personal creditors, was restricted by the Bankruptcy Act of 1839, the limitation being re-enacted by section 118 of the Bankruptcy Act of 1856, to the effect that no poinding of the ground not carried into execution by sale of the effects sixty days before sequestration, should be available in any question with the trustee, except for the interest of the current half-yearly term, and arrears of interest for one year immediately preceding such term. That section was, however, repealed by section 55 of the Conveyancing Act of 1874, the effect of which was, as the Bankruptcy Act of 1856 repealed all previous legislation on the subject, to restore the common law as it existed prior to the Act of 1839, and as it had been declared in the case of *Campbell's Trs.* v. *Paul*, already cited.[2] By section 3 of the Conveyancing Act 1874 Amendment Act of 1879, the provisions of section 118 of the Bankruptcy Act of 1856 have, however, been re-enacted so far as relating to poindings of the ground, and by section 2 of the Conveyancing Amendment Act of 1887, by which both the previous Conveyancing Acts of 1874 and 1879 were amended, the statutory restriction is now applicable to poindings of the ground at the instance of the creditors of the bankrupt's ancestors and to bankruptcies in foreign countries.[3] In the case of the *Atholl Hydro. Co.* v. *Scottish Provincial Assurance Co.*,[4] the statutory limitation was held not to apply to creditors in the liquidation of a company, but by section 3 of the Companies Act of 1886 it was made applicable to these as well as to creditors in a sequestration.

[1] Campbell's Trs. *v.* Paul, 1835, 13 S. 237. Doubt was expressed as to the effect of the execution of the writ *after* the trustee's confirmation; *but* the doubt was finally resolved in favour of the poinder in Dick's Trs. *v.* Whyte's Tr., *infra.*

[2] *See* Royal Bank *v.* Bain, 1877, 4 R. 895; Dick's Trs. *v.* Whyte's Tr., 1879, 6 R. 586.

[3] *Superseding* Miller's Trs. *v.* Millar & Sons' Trs., 1886, 13 R. 543; *and* Scot. Union and Nat. Co. *v.* James, 1886, 13 R. 928.

[4] *Supra.*

## III. Sequestration for Rent


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**Nature of Action.**—Sequestration for rent is the judicial means by which a landlord makes his right of hypothec effectual. It is of two kinds—(*a*) in payment, when the term of payment has passed while the rent remains unpaid; and (*b*) in security for the rent current and to become due; but both kinds may be concluded for in one writ. It may therefore be applied for both where there are arrears due and where the landlord has reason to suspect or apprehend that the tenant is endeavouring to deprive him of his hypothec by displenishing the premises or removing the effects, or where the credit of the tenant is suspected. The sequestration has the effect of rendering special the landlord's right, which before was merely general, and makes it attach to each individual article sequestrated, so as to entitle the landlord to recover the property, or its value, into whose hands soever it may have passed. Prior to the Hypothec Abolition Act of 1880, the landlord of every heritable subject possessed a right of hypothec for his rent, but since the passing of that Act there is no hypothec for the rent of any land (including the rent of any buildings thereon) which exceeds two acres in extent, and is let for agriculture or pasture, unless the rent be due under a bargain which was current at 11th November 1881.

*Sequestration in Payment.*—In agricultural subjects, in which under the Act of 1880 the right of hypothec has not ceased and determined, the crop of each year is held to be hypothecated for the rent of that year, and it, along with the stock, is secured by the right of hypothec for three months after the last legal or conventional term of payment; but if not made effectual by sequestration within that time, the hypothec ceases.[1] The same limit of time exists under the common law in regard to the hypothec over

[1] 30 & 31 Vict. c. 42, s. 4.

furniture in urban leases. Where agricultural produce or stock is sequestrated, it is incompetent to include in the sequestration any household furniture, agricultural implements, imported manures, etc., not incorporated with the land; but manures, etc., brought to the land under an obligation in the lease, may be included.[1] In sequestrating, therefore, it is only the crop of the particular year which can be touched, and the sequestration must be used while the right of hypothec lasts.

*Sequestration in Security.*—Before the term of payment, if the tenant be either in embarrassed circumstances or is removing the stock and crop so as to endanger the rent, the landlord may sequestrate in security *currente termino.* Some differences in the proceedings between this form of sequestration and that in payment will be referred to later. The remedy of sequestrating in security is one which the landlord is entitled to obtain whenever he craves for it on grounds which are relevant, and to make the action relevant he must aver either that the tenant is actually *vergens ad inopiam,* is removing effects in breach of the landlord's right of hypothec, or is otherwise endangering that right.[2] The remedy is one which the landlord takes at his own risk, and, as a rule, at his own cost, and if it be used wrongfully, subjects him to liability for damages.[3] If the rent be actually paid when due, the mere fact that he had reasonable grounds for using the remedy, such as the existence of arrears, will not free the landlord from the expenses of the sequestration.[4]

**Form of Action and Procedure.**—The writ sets forth the title of the applicant and of the respondent, the lease or other tenure under which the farm or house is held, the date at which the rent falls or fell due, the fact that (in the latter case) it remains unpaid, and, where sequestration in security is demanded, the tenant is *vergens ad inopiam,* or other fact relevant to the remedy sought. The crave asks the Court (*a*) to sequestrate the effects on the premises in question in security or payment, as the case may be; (*b*) to authorise an inventory of them to be made; and (*c*) thereafter to grant warrant to sell the sequestrated effects. It may also

[1] 30 & 31 Vict. c. 42, s. 6.

[2] Donald *v.* Leitch, 1886, 13 R. 790.

[3] Oswald *v.* Græme, 1851, 13 D. 1229; Watson *v.* M'Culloch, 1878, 5 R. 843; Nicol *v.* Mercer, 1902, 10 S.L.T. 142 (O.H.).

[4] Gordon *v.* Suttie, 1836, 14 S. 954.

contain (*d*) a conclusion for a decree of payment of the rent, whether brought after the term of payment or *currente termino*.[1] Since the power to sequestrate extends only over effects which are actually on the premises, it may also ask in special circumstances, which ought to be succinctly set forth, (*e*) for authority to bring back effects which have been illegally removed from the premises in breach of the right of hypothec. It may further ask (*f*) a warrant for the ejection of the tenant on failure to replenish, (*g*) a warrant to re-let the subjects, and (*h*) an ordinary decree for any balance of rents which may remain due. Under the form of process introduced by the Act of 1907, there does not appear to be any incompetency in combining in the same writ a crave for sequestration for rent and a claim for payment of any kind of debt, or for interdict. In the case of a sequestration in security, a warrant to sell cannot in general be granted till after the term of payment. Where, however, the effects are of a perishable nature and the tenant is bankrupt, and is either allowing them to perish for want of care or is making away with them, a warrant to sell may be granted at once.

*Inventory of Effects.*—Unless a caveat has been lodged or an interdict obtained,[2] the Court, upon presentation of the writ, sequestrates and grants warrant to inventory and secure the effects, in the deliverance containing the warrant of service,[3] which must be signed by the Sheriff or Sheriff-Substitute.[4] Under this warrant, which is served on the defender, an officer of Court, in presence of a witness, makes an inventory of the whole effects secured by the hypothec, and returns an execution signed by himself and the witness. This inventory must be specific, and, where the premises are large, should specify the particular place where each article is found, so that it may be identified without difficulty. The inventory measures the extent of the sequestration, nothing which is not specified in it falling under the sequestration.[5] It has, however, been held that the unborn offspring of a pregnant animal is included though not specified.[6] The inventory is appended to the writ along with the execution of service. All warrants to sequestrate, inventory, sell, or eject are held to include authority to open shut and lockfast

[1] Act, Rule 104.
[2] *See infra.*
[3] Act, Rule 105.
[4] Act, Rule 7.
[5] Horsburgh *v.* Morton, 1825, 3 S. 596.
[6] Lamb *v.* Grant, 1874, 11 S.L.R. 672.

places for the purpose of carrying the warrant into execution.[1] Where the writ contains a crave for warrant to carry back effects removed in breach of the right of hypothec, such warrant may be granted upon cause shown. The crave for this warrant may be embodied in a separate minute endorsed on the writ, in which case intimation should be made both to the defender and to the person in whose custody the effects are.[2] It is the duty of the officer to inform himself by his own inspection of the particulars he states in the inventory. But if in addition to, or in place of, a formal inspection upon the ground he makes up his inventory from information supplied to him for the purpose by the tenant himself, and if the information is true and the inventory accurate, the tenant can have no ground of complaint.[3] When the Sheriff, on a crave that the tenant be ordered to re-stock and replenish the subjects, or failing his so doing that he be ejected, grants warrant to replenish as craved, he must fix a definite time within which the replenishing must take place, otherwise the tenant cannot be in default in respect of his failure, and therefore cannot competently be ejected by summary diligence.[4] The Sheriff may at this or at any stage appoint a fit person to take charge of the sequestrated effects, or may require the tenant to find caution that they shall be made forthcoming.[5]

*Procedure where Action Defended.*—Where the defender opposes the sequestration he must enter appearance in the usual way. If he consigns, or finds caution for, the rent sued for, he is entitled to have the sequestration recalled, and such consignation may be made or caution found before appearance is entered. If the litigation goes on, a record is made up in common form. Where the sequestration is recalled on caution, decree for payment of the rent and expenses incurred may be given against the tenant and enforced against him and the cautioner[6]; where the rent has been consigned, payment may be given out of the consigned money.

[1] Act, Rule 105.

[2] Johnston *v.* Young, 1890, 18 R. (J.C.) 6; Gray *v.* Weir, 1891, 19 R. 25; M'Lauchlin *v.* Reilly, 1892, 20 R. 41.

[3] Taylor *v.* Macknight, 1882, 9 R. 857, *per* Ld. Kinnear.

[4] Macdonald *v.* Mackessack, 1888, 16 R. 168; *see as to irregularities the following cases, decided under the S. D. Acts*: Brown *v.* Halley, 1895, 3 S.L.T. 22 (O.H.); Mackenzie *v.* Paul, 1895, 3 S.L.T. 71; Mackenzie *v.* Grant, 1903, 11 S.L.T. 575.

[5] Act, Rule 109.

[6] Clark *v.* Duncan, 1833, 12 S. 158.

*Sale of Sequestrated Effects.*—Where the sequestration is unopposed, or unsuccessfully opposed, a warrant to sell the sequestrated effects is granted. This warrant may be granted after the lapse of the three months, provided the effects have been inventoried within that time. In the case of a sequestration in security, the warrant will not be granted until the term of payment has come and is bygone. The sale is by public roup, and takes place at the sight of the Clerk of Court or of some person appointed by the Sheriff,[1] and either the Sheriff or the person at whose sight the sale is appointed to take place, fixes its date and place and makes provision for its due advertisement. Goods should be sold only to the extent of the rent and expenses, though it will not be an objection that a small surplus has been realised.[2]

*Report of Sale.*—On the conclusion of the sale, or at latest within fourteen days thereafter, the roup roll, or a certified copy of it (along with a state of the proceeds and expenses of the sale, showing how the debt stands) must be lodged in the hands of the Clerk of Court,[3] and the Sheriff, if he sees fit, *ex proprio motu* or on motion, may order the gross proceeds to be consigned. If the subjects have been displenished, a minute may be lodged craving an order on the defender to replenish, and on the defender's failure to obtemper the order a warrant may be granted to eject the defender and relet the subjects. The accounts are taxed by the Auditor, the report of the sale is approved by the Sheriff, and any balance remaining over is paid back to the tenant. In the interlocutor approving the report of the sale, or by separate interlocutor, the Sheriff may give decree against the defender for any balance remaining due,[4] such a decree being extracted and diligence done upon it in common form.[5]

**Register of Sequestration.**—Under section 7 of the Hypothec Amendment Act of 1867, the Sheriff-Clerk is bound to keep a register of all sequestrations issued, and to exhibit it to any one applying, on payment of a fee of one shilling. It is the duty, or at least the interest, of the landlord to see that registration is duly made, since if it be neglected the validity of the sequestration may be questioned.

[1] Act, Rule 106.
[2] Galloway *v.* M'Pherson, 1830, 8 S. 539.
[3] Act, Rule 107.
[4] Act, Rule 108.
[5] Act, Rule 104.

**Caveat or Interdict against Sequestration.**—Where a tenant has reason to believe that sequestration is about to be used against him illegally, he may lodge a caveat, which will ensure him an opportunity of being heard before the warrant is issued. If, on the other hand, he desires that the question at issue between himself and the landlord be settled without waiting till the latter chooses to move, he may competently apply for interdict. In neither case, however, will the landlord's right be interfered with in general, except on caution or consignation.

*Effects improperly included in Sequestration.*—Where a third party complains that goods belonging to him have been improperly included in the inventory, his remedy is to crave leave to appear in the sequestration and to state objections to the warrant of sale being granted, an interdict against the landlord from proceeding with the sequestration being incompetent, so long at least as the warrant has not been granted.[1] Thus, where the property of a third party (a hired piano) was included in the inventory of articles to be exposed for sale under a landlord's sequestration for rent, it was held that the proper course for the owner was to move the Sheriff who granted the warrant of sale to insert a condition in the warrant that the third party's goods should be sold last of all, or to make a similar request to the Sheriff-Clerk who was judge of the roup.[2]

**Breach of Sequestration.**—A tenant is liable to be summarily fined and imprisoned for breach of sequestration if he removes or sells the sequestrated effects, and is further liable for all loss and damage which he may occasion. Any person who knowingly assists him to commit a breach is liable not only to similar punishment and fine, but also for the amount of the rent. It does not, however, constitute a breach of the sequestration that the tenant merely uses such of the sequestrated effects as are required for the sustenance of himself and those dependent on him[3] or of sequestrated animals,[4] even though the effects be consumed in the using. And if the tenant act in *bona fides* he will not be subjected to any arbitrary punishment, even though he have *de facto* committed a breach of the sequestration. Thus, where a tenant, in accordance with a belief

[1] Lindsay *v.* E. of Wemyss, 1872, 10 M. 708; Hoare *v.* Mackay, 1905, 13 S.L.T. 588.

[2] M'Intosh *v.* Potts, 1905, 7 F. 765.

[3] M'Glashan *v.* Atholl, 29th June 1819, F.C.

[4] Miller *v.* Paterson, 1831, 9 S. 792.

prevalent in the county, thought that a certificate by the Clerk of Court to the effect that caution had been lodged, operated as a recall of the sequestration and acted in accordance with his belief, he was held not liable in punishment.[1] Where a writ for breach of sequestration prays for penal consequences, the concurrence of the Procurator-Fiscal should be obtained, as in the case of an action for breach of interdict, and the proceedings follow the same course.

### IV. Applications under the Heritable Securities Act, 1894

Under this Act,[2] the following applications to the Sheriff of the county in which lands disponed in security, or any part thereof, are situated, are competent:—

1. A creditor in possession of lands disponed in security may apply for warrant to let the lands disponed in security, or part thereof, for a period exceeding seven years and not exceeding twenty-one years in the case of heritable property in general, and thirty-one years in the case of minerals. The writ, which is served on the proprietor and on the other heritable creditors, if any, sets forth the name of the proposed tenant or tenants and the duration and conditions of the proposed lease. After such intimation and inquiry as he thinks proper, and if satisfied that a lease for a period not longer than twenty-one years is expedient for the beneficial occupation of the lands, the Sheriff may approve of the proposed lease on the terms and conditions proposed.[3] The ordinary practice, where appearance is not made for the defenders, is to remit the various applications under the Act to a conveyancer to inquire and report.

2. A creditor who has exposed the security subjects for sale at a price not exceeding the amount due under his security and under any prior security, and any security or securities ranking *pari passu* with the exposer's security (exclusive of the expenses attending the exposure or prior exposures), or at any lower price, and has failed to find a purchaser, may apply to the Sheriff for decree that the debtor in the bond has forfeited his right of redemption, and that the creditor is vested in the lands as absolute proprietor, subject to the conditions

[1] Kippen *v.* Oppenheim, 1846, 8 D. 957.

[2] 57 & 58 Vict. c. 44.

[3] *Ibid.*, s. 7.

and burdens contained in the bond.[1] After service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, the Sheriff may grant such application and issue decree in the term of Schedule D appended to the Act, which contains a description of the subjects and is registered in the Register of Sasines. The effect of the decree is to extinguish the debtor's right of redemption and to give the creditor a right to the lands in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of the decree. After registration the lands are disencumbered of all securities and diligences posterior to the creditor's security. Instead of granting such a decree, the Sheriff may appoint the lands held subject to the security to be re-exposed for sale at a price to be fixed by him, in which event the creditor may bid for and purchase the lands. If the creditor becomes the purchaser, the Sheriff may issue a decree in the terms already referred to, or the creditor may grant a disposition of the lands to himself as if he had been a stranger.[2]

3. A creditor holding a security ranking *pari passu* with another who desires to sell the security subjects, but who is unable to obtain the consent of the *pari passu* security holder, may apply to the Sheriff for warrant to sell the lands, calling such other creditor as defender. If in his opinion it is reasonable and expedient, and after hearing parties and making such inquiry as he thinks fit, the Sheriff may order a sale of the lands, and, in case of difference of opinion, may fix the price, and authorise both or either of the parties or some other person to carry through the sale. Upon payment or consignation of the price, the Sheriff may authorise such persons to grant a conveyance and disencumber the lands of the securities in the same way and to the same effect as if the creditors were carrying through the sale by agreement, and to fix the times and conditions of sale according to the law and practice relating to premonition and advertisement. The expenses of, and connected with, the sale are payable preferably out of the price or proceeds of the sale, and the balance is paid to the creditors according to their rights and preferences.[3]

[1] Where the pursuer makes the application under two bonds, he must have exposed the whole lands held under both bonds to entitle him to succeed in his application; *see* Webb's Exr. *v.* Reid, *infra*.

[2] *Ibid.*, s. 8; *see* Lusk *v.* Tait, 1899, 15 Sh. Ct. Reps. 249.

[3] Act, 1894, s. 11.

*Appeal.*—The interlocutor of the Sheriff who pronounces any order or decree under the foregoing three sections of the Act is final, and not subject to review except (*a*) as regards questions of title, and (*b*) where the principal sum due under the security exceeds £1000. An appeal from the Sheriff-Substitute to the Sheriff appears to be competent.[1]

*Expenses.*—The Sheriff may award expenses or direct that they be treated as part of the expenses of sale.

4. A creditor in a security may apply to the Sheriff for warrant to intimate the demand for payment specified in section 119 of the Conveyancing Act of 1868, to the debtor at the office of the Keeper of the Record of Edictal Citations, in cases (*a*) where the debtor has died and no heritable title has been completed to the lands by his heir or other representative, and the name and address of such heir cannot be ascertained; (*b*) where the creditor cannot ascertain the address of the debtor, or whether he is alive; and (*c*) where the debtor cannot ascertain the address of the person who in terms of the security is legally entitled to receive intimation of the demand of payment.[2]

The Act provides that no purchaser from the creditor or other successor in title to the lands is under any duty to inquire into the regularity of the proceedings under which such creditor has acquired his right to the lands by virtue of the provisions of the Act, or is affected by any irregularity in such proceedings, without prejudice to any competent claim of damages against the creditor.[3] This provision has been held to afford a complete defence to an action raised by the original owner of subjects against the disponee of foreclosing creditors, although founded on alleged irregularities in the execution of the petition.[4] It has also been held to exclude all scrutiny of the various steps taken to expose the property for sale prior to the Sheriff's decree, including questions as to the adequacy of advertisement.[5]

[1] Webb's Exrs. *v.* Reid, 1906, 14 S.L.T. 323 (Sh. Ct.)

[2] Act of 1894, s. 16.

[3] *Ibid.*, s. 10.

[4] Sutherland *v.* Standard Life, etc., Assurance Co., 1902, 4 F. 957; Sutherland *v.* Thomson, 1905, 8 F. (H.L.) 1.

[5] M'Donald *v.* Winkler, 1903, 10 S.L.T. 353 (O.H.); *see also* Forbes *v.* Pollock, 1900, 16 Sh. Ct. Reps. 329.

# CHAPTER XXXI

## ACTIONS OF ALIMENT AND OF SEPARATION AND ALIMENT

### I. Actions of Aliment


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**Nature of Action.**—Certain persons, who by reason of nonage or from other causes are unable to support themselves, are entitled, in certain circumstances and in respect of certain relationships, to judicially enforce a claim for aliment. The action is initiated in the ordinary way, and with the exception of certain particulars proceeds in all respects as if it were an ordinary action. The action differs, however, from the ordinary action in respect (1) it is entitled to extraordinary dispatch and to proceed during vacation as during session; (2) the Sheriff is entitled at any stage of the action to grant an interim award; (3) the decree which is granted is not (like a decree of separation[1]) permanent in its character, but is liable to revision from time to time upon the emergence of a change of circumstances in the defender's financial condition;[2] (4) in addition to the ordinary diligence which may follow on the decree, obedience

[1] *See* Strain *v.* Strain, 1890, 17 R. 297.

[2] Purves' Trs. *v.* Purves, 1900, 8 S.L.T. 150 (O.H.); Rowat *v.* Rowat, 1904, 12 S.L.T. 449; Robertson *v.* Robertson, 1905, 13 S.L.T. 114 (O.H.).

to the decree may, in certain defined circumstances, be enforced by imprisonment; and (5) wages due to the defender, even though they do not amount to twenty shillings in the week, may competently be arrested on the decree.

**Actions Competent.**—(1) *Claims by Wife against Husband.*—All actions of aliment are competent in the Sheriff Court[1] except such as involve the decision of a question of status as the primary ground of liability. Thus a wife who founds upon an irregular marriage which her reputed husband denies, cannot sue for aliment in the Sheriff Court, because her right to aliment depends upon the existence of the marriage, which must first be determined before her right emerges.[2] On the other hand, if the parties have been publicly married according to recognised forms, the action is competent, a defence that the marriage was invalid being incompetent in the Sheriff Court.[3] So, where a widow sued for aliment, the trustees under her husband's trust disposition and settlement, under which she was entitled to the income of the trust estate, which had so diminished as to be insufficient for her maintenance, the action was held competent, since, being an action not between husband and wife, but between a widow and her husband's representatives, it did not involve the decision of any question of status.[4] The same principle is applicable when any other question of status is raised, as for example the right of married persons to live separate. Thus a wife cannot competently sue her husband for aliment in the Sheriff Court, basing her claim on the ground that she is living separate from him by reason of his cruelty, since the proper preliminary to such a claim would be an action of adherence, competent only in the Supreme Court. But while in actions at the instance of a wife the Sheriff never could, and perhaps cannot even now, competently award permanent aliment, he has hitherto possessed the power to award interim aliment, limited strictly to such time as might enable the party suing for aliment to have the position of the parties definitely settled by an action in the Court of Session, the only tribunal having jurisdiction to entertain purely consistorial actions.[5]

[1] 11 Geo. IV. & 1 Will. IV. c. 69, s. 32; Act, s. 5 (2).

[2] Benson *v.* Benson, 1854, 16 D. 555.

[3] M'Leod *v.* Telfer, 1820, Hume, 10; Wylie *v.* Hamilton, 8th July 1824, F.C.; Reid *v.* Black, 1814, Hume, 5.

[4] Young *v.* Young's Trs., 1906, 14 S.L.T. 123 (Sh. Ct.).

[5] Smith *v.* Smith, 1874, 1 R. 1010; M'Donald *v.* M'Donald, 1875, 2 R. 705.

An important alteration of the law would, however, appear to be effected by the Act of 1907. The phraseology of section 5 of the Act, by which the jurisdiction of the Sheriff is expressly *extended* to include "actions of aliment" without qualification, would appear to be wholly unmeaning, unless *all* competent actions of aliment are intended to be included. It has been held competent in the Court of Session to award aliment to a deserted wife so long as her husband refuses to entertain and receive her, without any conclusion for separation or adherence.[1] Assuming, therefore, the competency of such an action, there does not appear to be anything in the terms of the Act to prevent the Sheriff granting an award of aliment "so long as the defender shall refuse to receive and entertain his wife." As the defender may always put himself in the right by raising an action of adherence in the Court of Session, or by offering to receive his wife back, no hardship seems to be involved in such a construction of the Statute. The phrase "permanent" aliment is misleading, in so far as an award of aliment, the decree in which is always extracted *ad interim*, is essentially conditional, and may be varied or cancelled at any time. The liability of the defender in an award of aliment being therefore strictly conditional, it is immaterial whether the award bears expressly to be granted till the rights of the parties are determined by a competent Court, till the Court awarding it otherwise orders, or till the husband consents to receive his wife back. The construction of the Act suggested obviates the necessity for considering whether an action of adherence is a declarator (though, as the defender is *ordained* to adhere, it does not seem to be one), or whether such an action, or one of separation, involves a question of *status*.[2]

Where, however, no question of status is involved, as in the case of father and son, where the relationship is admitted, jurisdiction is conferred upon the Sheriff. In the case of illegitimate children, no question of status is raised, even though the paternity is disputed. As between parent and child the action is competent at the instance of an indigent parent against his children, and by a child against its parent.

[1] Pearce *v.* Pearce, 1898, 5 S.L.T. 338 (O.H.); Gatchell *v.* Gatchell, 1898, 6 S.L.T. 224 (O.H.); Hicks *v.* Hicks, 1898, 7 S.L.T. 339 (O.H.); *but see* Coutts *v.* Coutts, 1866, 4 M. 802; Crombie *v.* Crombie, 1868, 6 M. 776.

[2] *See* Low *v.* Low, 1908, 16 S.L.T. 352; Macdonald *v.* Macdonald, 1908, 24 S.C.R. 271, *per* Sheriff Maconochie, K.C.; *and* Samuel *v.* Samuel, 1909, 1 S.L.T. 245, *per* Sheriff Lorimer, K.C.

(2) *Claim of Children to Aliment.*—The obligation of a parent to aliment his child continues until the child is of age and is able to aliment him or her self, but ceases on forisfamiliation. It continues, however, in all ranks of life until the child is physically able to earn a livelihood, and among the wealthier classes still longer, if the child be destitute, especially in the case of daughters. If after forisfamiliation the child falls into indigence the obligation revives, and as the obligation is in the nature of a debt, it transmits against the representatives of the father. A posthumous child has therefore a claim against his father's estate.[1] Failing the father, the mother is liable if she possesses the means; and failing father and mother, the grandfather is liable.[2] A step-mother is not, however, liable.[3] A son who has been suitably educated and placed in a profession is not entitled to aliment, though he may be if from physical or mental infirmity he is disabled from earning a livelihood.[4] "Support beyond want" is all that a child is entitled to, but the term "want" is construed with reference to the rank and circumstances of the parties. Thus a person who has received the education of a gentleman, and who has been deprived of the means of subsistence, is not placed above the reach of want by getting the subsistence of a pauper. The right to be relieved from want in the case of aliment, is a right to be secured against that pressure of want which would place the child in the position of a pauper relatively to his position in life.[5] The measure of the father's liability is that he is bound to maintain and educate his children suitably to his condition in life, so far as he possesses the means necessary to do so, with strict economy.[6] A young man, therefore, who has been apprenticed by his parents to a profession is entitled to reasonable aliment until such time as he has learned his profession.[7] But if the child be otherwise provided for, the parent's obligation ceases.[8] The wife of an indigent son has a legitimate claim upon her husband's father, except in such cases as those in which her own father is able to support her,[9] while

[1] Spalding *v.* Spalding's Trs., 1874, 2 R. 237.

[2] *See* Leslie Par. Council *v.* Gibson's Trs., 1899, 1 F. 601.

[3] Macdonald *v.* Macdonald, 1846, 8 D. 830.

[4] Smith *v.* Smith, 1885, 13 R. 126.

[5] *Ibid.*, *per* Ld. Pres. Inglis.

[6] Watson *v.* Watson, 1896, 33 S.L.R. 771 (O.H.).

[7] Whyte *v.* Whyte, 1901, 38 S.L.R. 670.

[8] *See* D. of Sutherland, 1905, 13 S.L.T. 104 (O.H.).

[9] Wallace *v.* Goldie, 1848, 10 D. 1510.

her husband is alive, though the obligation ceases in general on his death.[1] But a father-in-law is not bound to aliment the deserted wife of his son.[2] An offer by the father to receive the child in his house is sufficient in general to discharge the obligation, but this rule is subject to the exception that if the parent's conduct has been such as to be likely to prove morally prejudicial or physically injurious to the child he will be entitled to be alimented furth of his father's house.[3] A divorced husband remains liable for the aliment of the children of the marriage.[4] While it is true that a claim for aliment is in the nature of a debt due by the parent to the child, it is not a debt in the sense that it amounts to a burden on the parent's trust-estate to the effect of preventing the trustees distributing the estate amongst the beneficiaries; the trustees in such a case are entitled to distribute the estate amongst the beneficiaries under the express burden of alimenting the child, such beneficiaries being liable to continue the aliment to the extent of the benefit taken by them, except perhaps where they themselves become indigent, and for the length of time during which the obligation would have rested on the parent.[5]

(3) *Claim of illegitimate children.*—The aliment of an illegitimate child is a joint burden upon both parents, the obligation subsisting till the child is able to earn a subsistence for him or her self, according to the circumstances of each individual case, and the general rule being that the father must contribute one-half of the amount necessary for the child's support till it is seven, or in some cases ten years of age. The reason for the rule is that during these years it is proper that the child should be left with its mother, and that it is not able to do anything for its own support. After that age a great deal depends upon the condition of the parties, and if the mother chooses to go on keeping the child without asking for more money or insisting upon the father taking the child, then, if she thinks fit to bring an action for aliment of the child at the end of two or three years, she may be held to be debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody

[1] Hoseason, 1870, 9 M. 37.

[2] Reid *v.* Reid, 1897, 4 S.L.T. 395 (O.H.).

[3] Ketchen *v.* Ketchen, 1871, 9 M. 690.

[4] Foxwell *v.* Robertson, 1900, 2 F. 932.

[5] Davidson's Trs. *v.* Davidson, 1907, S.C. 16.

and charge of the child, then is the time for him to offer to take it; and if the mother does not offer to keep it, the father will have to support it until it is fourteen or until it is able to do for itself.[1] If, however, the mother of an illegitimate child agrees to maintain the child at her own expense, she cannot afterwards insist on the father paying his share of aliment. Thus, in the case of illegitimate twins each parent agreed to keep and maintain one child, and the mother was held to be barred from thereafter suing the father for his contribution towards the child's aliment.[2] It is a settled rule that the father of an illegitimate son is not bound to pay aliment to the mother after the child has attained the age of seven, if he then makes a *bona fide* offer to receive the child into his home and to support him there,[3] or to place it in the care of a suitable custodier.[4] There are, however, exceptions to the rule where it is certain that the change would be detrimental to the child's health, the criterion being what is best in the interest of the child himself.[5] The amount of aliment to which the child is entitled is, as in the case of legitimate children, that which will support it above want,[6] the wealth of the father, in general, affording no criterion.[7] In modern practice the rate allowed against the father is 2s. 6d. per week, payable quarterly in advance, though it varies in different districts, the amount in Glasgow being fixed at £8 per annum. On the insolvency of the father of an illegitimate child, the mother's claim for aliment to the child gives her a *jus crediti*, which entitles her to rank for the aliment on the father's bankrupt estate,[8] in which respect she has an advantage over the mother of a legitimate child, who, having united her fortunes and those of her children with the father, must follow his fate, and, independently of special contract, has no *jus crediti* entitling her or her children to rank for their legal provisions in the case of the father's bankruptcy.[9] It is, however, no defence to an action by an illegitimate child against the estate of its deceased father, that

[1] Dunnet *v.* Campbell, 1883, 11 R. 280, *per* Ld. Pres. Inglis.

[2] Wilson *v.* M'Minnin, 1905, 7 F. 538.

[3] Miller *v.* Melville, 1898, 1 F. 367.

[4] Moncrieff *v.* Langlands, 1900, 2 F. 1111.

[5] Brown *v.* Halbert, 1896, 23 R. 733.

[6] Maule *v.* Maule, 1825, 1 W. & S. 266.

[7] *See* Lamb *v.* Paterson, 1842, 5 D. 248.

[8] Downs *v.* Gourlay, 1886, 13 R. 1101.

[9] Bell, Com., i. 681, 688.

he had made an agreement with third parties for its adoption and aliment.[1]

(4) *Claim by indigent Parent against Child.*—A parent when in indigence has a claim against his children for aliment when their circumstances are such as to enable them to afford it.[2] An illegitimate child is bound to support his mother, though whether he is equally bound to support his reputed father is more than doubtful.[3] At common law a husband is bound to support the indigent parents of his wife during the subsistence of the marriage,[4] but since the passing of the Married Women's Property Act, 1881, a husband who is not *lucratus* by the marriage is not liable to support his wife's parents.[5] The obligation of children to aliment their parents is not joint and several, and in an action at the parent's instance it is not necessary to call all the children as defenders.[6]

**Decree for Aliment.**—The decree is not permanent, and an application to alter the rate is competent on the emergence of a change of circumstances in defender's financial position. It should not, therefore, be expressed so as to preclude an alteration in the rate at some future time, and it may competently be declared to be granted subject to recall or re-arrangement by the Court when any alteration of circumstances arises.[7] Thus, where in an action of multiplepoinding a pupil and his curator *ad litem* lodged a claim for aliment, which the Court fixed at a reasonable rate, it was held competent to alter the award on a change of circumstances.[8] The rate of aliment fixed in a contract of separation is liable to revision on a change of circumstances in the same way as under a decree of separation and aliment.[9]

**Enforcement of Decree.**—(1) *By Poinding and Arrestment.*—The decree for aliment is enforced in all respects in regard to ordinary

[1] A. B. *v.* C. D., 1900, 2 F. 610.

[2] Thom *v.* Mackenzie, 1864, 3 M. 177; Hamilton *v.* Hamilton, 1877, 4 R. 688.

[3] Samson *v.* Davie, 1886, 14 R. 113.

[4] Reid *v.* Moir, 1866, 4 M. 1060; Foulis *v.* Fairbairn, 1887, 14 R. 1088.

[5] M'Allan *v.* Alexander, 1888, 15 R. 863; Dear *v.* Duncan, 1896, 3 S.L.T. 379 (O.H.).

[6] Dear *v.* Duncan, *sup.*

[7] Thom *v.* Mackenzie, *sup.*; Hay *v.* Hay, 1882, 9 R. 667; Macdonald *v.* Macdonald, 1881, 8 R. 985; Stewart *v.* Stewart, 1887, 15 R. 113; Oliver *v.* Bain, 1894, 2 S.L.T. 106; Scott *v.* Scott, 1894, 21 R. 853; Rowat *v.* Rowat, 1904, 12 S.L.T. 449 (O.H.); *cf.* Robertson *v.* Robertson, 1905, 13 S.L.T. 114 (O.H.).

[8] Purves' Trs. *v.* Purves, 1900, 8 S.L.T. 150 (O.H.).

[9] M'Keddie *v.* M'Keddie, 1902, 9 S.L.T. 322 (O.H. *per* Ld. Kyllachy).

diligence in the same way as a decree for the payment of an ordinary debt, with this difference, that wages under twenty shillings, which are exempt from arrestment for ordinary debt, may competently be arrested for payment of an alimentary debt,[1] the arrestment attaching everything beyond what is necessary for the debtor's subsistence,[2] what is necessary being a question of fact varying according to circumstances.

(2) *By Civil Imprisonment.*—In addition to the ordinary diligence, there is in certain defined cases a power to enforce the decree by the personal diligence of imprisonment, which is conferred by section 4 of the Civil Imprisonment Act of 1882. That Act abolished imprisonment for alimentary debts, and in lieu of the former provisions granted a new power to imprison for wilful failure to pay any sums of aliment for which a decree has been pronounced by a competent Court. The Act thus abolishes the old personal diligence for alimentary debts, and so a warrant to imprison *in meditatione fugæ* consequentially falls with it. A decree for aliment is therefore not one which can of itself be followed by personal diligence, and requires a supplementary application to the Sheriff, on which a warrant can only follow after the debtor has failed to satisfy the Sheriff after proof that his failure to pay the sum decerned against him has not been wilful.[3] The application for a warrant to imprison the debtor can be applied for (1) only when it follows upon the decree of a competent Court, which presumably includes any English or Irish Court, proceeding under the Summary Jurisdiction Process Act of 1881, and does not extend to an extract of a registered bond or an agreement registered for execution[4]; (2) only when the debtor fails to pay the sum contained in the decree within the days of charge upon such decree. There must therefore be an expired charge, and it is improper in the charge to include the words "under pain of imprisonment"[5]; (3) only when the failure of the defender to pay the sum decerned for with expenses, within

[1] Wages Arrestment Limitation Act, 1871. The Act makes no difference between alimentary and ordinary claims in regard to arrestment in security, which for wages under 20s. is incompetent in both cases.

[2] 1 Vict. c. 41, s. 7; Shanks *v.* Thomson, 1838, 16 S. 1353.

[3] Glenday *v.* Johnston, 1905, 8 F. 24.

[4] *See* M'Geckie *v.* Cameron, 1897, 13 Sh. Ct. Reps. 357.

[5] Whiteford *v.* Gibson, 1899, 7 S.L.T. 233 (O.H.).

the days of charge, has been wilful, such failure being deemed to be wilful until the contrary is proved. Each termly payment forms a separate debt on which warrant may pass.[1] It is competent to grant a warrant for arrears of aliment on the ground that, the aliment being current, the effect of an alimentary decree cannot be limited to one term's payment, its effect being to draw back to and include the whole aliment which is due and unpaid.[2] As a *bona fide* offer to maintain and keep an illegitimate child absolves the father from his obligation to pay aliment to the mother, it affords a relevant objection to the granting of a warrant for imprisonment[3]: (4) only when the application is made by the creditor in the sum or sums decerned for. A claim for sums disbursed as aliment is not a claim for aliment, but merely for an ordinary debt, on which of course imprisonment cannot competently follow. Thus a decree in favour of a parish council against the father of an illegitimate child for repayment to them of sums spent in alimenting the child, does not warrant imprisonment.[4] The application, where practicable, should be presented to the Sheriff to whose jurisdiction the respondent is subject, but it would appear to be competent to present it also to any Sheriff within whose territory the respondent is found. The creditor in the sum decerned for is presumably the pursuer of the original action, and where the expenses are by the decree payable to the agent, it would not appear to have been the intention of the Act to enable him to apply for the warrant as the creditor in the sum decerned for, since in any event a decree for expenses cannot be an alimentary debt in the sense of the Act.[5]

*Form of Application for Warrant.*—The application, whatever be its precise form, is disposed of summarily, without any written pleadings.[6] It seems a necessary inference from this provision that the application must itself be in writing, and indeed, apart from statutory provision, writing of some kind would appear to be indispensable. No form is

[1] Walker *v.* Bryce, 1881, 9 R. 249. This case was decided prior to the passing of the Act of 1882, but the *ratio* of the decision seems applicable.

[2] *Per* Ld. M'Laren *in* Glenday *v.* Johnston, *sup. appg.*, Cain *v.* Malcolm, 1892, 19 R. 813.

[3] Wilson *v.* Lindsay, 1893, 1 S.L.T. 272.

[4] Tevendale *v.* Duncan, 1883, 10 R. 852; Mackay *v.* Resolis P. C., 1899, 1 F. 521.

[5] *See* Bulloch *v.* Pollock, 1887, 3 Sh. Ct. Reps. 249; Dove Wilson is of a contrary opinion, p. 383.

[6] Act of 1882, s. 4 (2).

prescribed by the Act. But while, in view of the fact that the application is essentially a step in diligence connected with an action already instituted, and not an "action" in the sense of the Act of 1907, there seems to be no valid reason why it should not take the form of a minute endorsed on the decree, it may most conveniently be dealt with as an independent process. The Act provides that no concurrence is necessary in making the application, the provision being introduced to show that while the diligence partakes of a *quasi* criminal character, the concurrence of the Procurator-Fiscal is unnecessary.[1] As the Act contemplates that the debtor is to be allowed an opportunity of proving that his failure to pay has not been wilful, he must, of course, be permitted an opportunity of leading evidence and of being heard before the warrant is granted. A deliverance is therefore pronounced fixing a diet for the disposal of the application, and ordering intimation thereof to be made to the debtor on a reasonable period of induciæ, say of forty-eight hours. The application and warrant must be served on the debtor,[2] and as it is doubtful whether the Act authorising postal citation applies to diligence, the service should be effected in the ordinary way, and *ob majorem cautelam* be on the debtor personally. If at the diet the debtor fails to appear, warrant to imprison is granted. If, however, he appears at the diet, he may competently lead his evidence, if he has any, showing that his failure to pay has not been wilful; though, if an adjournment be desired, there does not appear to be any reason why it should not be granted. There is, however, no power to incarcerate the debtor in the interval.

*Disposal of the Application.*—At the diet, original or adjourned, the Sheriff hears any evidence which the parties may adduce, the *onus* of proof being on the debtor.[3] Any evidence competent in an ordinary civil proceeding, including that of the debtor or his wife, may be adduced. As the application is disposed of summarily, the evidence is not recorded. If the debtor succeeds in establishing to the satisfaction of the Sheriff, that since the commencement of the action in which the decree was pronounced he has not possessed or been able to earn the means to pay what is due, or such an instalment of it as the Sheriff may deem reasonable, the application will be refused. If the proof which he leads is not

[1] Act of 1882, s. 4 (1).
[2] Cook *v.* Wallace, 1889, 16 R. 565.
[3] Act of 1882, s. 4 (3).

such as to satisfy the Sheriff as to his possession of means or the ability to earn them, the application must be granted. As the Sheriff must personally be "satisfied" with the proof adduced, it is superfluous, if not actually *ultra vires* of him, to pronounce findings in fact, or to give his reasons for his "satisfaction" or the want of it, and in the interlocutor granting or refusing to grant warrant to commit the debtor to prison, he should simply state without comment the fact that the application is granted or refused.[1] If the application be granted, the Sheriff may grant warrant to commit the debtor to prison for any period not exceeding six weeks, or (*a*) until payment of the sum or sums of aliment and expenses decerned for; (*b*) until payment of such instalment or instalments thereof as the Sheriff may consider reasonable; or (*c*) until the creditor be otherwise satisfied. The Act contains no power to award expenses to the successful party. If the applicant be successful, it would seem in accordance with equity that he should be awarded his expenses; but the Act does not authorise them to be recovered by imprisonment, and fails to give authority for their recovery by any other diligence. Had the proceedings been judicial, expenses might have been awarded on the ground that as in such proceedings the Court is absolute master on the question of expenses, and may award them without any express crave to that effect to the party to whom it considers they ought equitably to be awarded. But as the proceedings in an application for imprisonment partake essentially of the character of the enforcement of diligence, the rule that the creditor can recover nothing except what the decree or the special powers of the law give him, appears to apply.[2] As the debtor incurs any expense to which he may be put solely for his own protection, there does not seem, even if he is successful, any good reason why his expenses should be paid by his opponent.

*Appeal.*—There is no power of appeal from the judgment of the Sheriff-Substitute either to the Sheriff[3] or to the Court of Session,[4] against a deliverance granting or refusing to grant warrant of imprisonment: an appeal has, however, been held competent from the judgment of the Sheriff-Substitute to the Court of Session, not against the interlocutor as granting or refusing to grant the warrant craved,

[1] Strain *v.* Strain, 1886, 13 R. 1029.

[2] *See* Strain *v.* Strain, 1888, 4 Sh. Ct. Reps. 125.

[3] *See* Christie *v.* Lowden, 1890, 6 Sh. Ct. Reps. 140.

[4] Strain *v.* Strain, 1886, 13 R. 1029.

but on the ground that the Sheriff-Substitute had failed to exercise his discretion as required by Statute.[1]

*Renewal of Application.*—Where the creditor fails to obtain a warrant he may renew his application at any time.[2] Where he gets a warrant, if any balance remains due under the decree, he may apply for a new warrant of imprisonment at intervals of not less than six months, which it may be presumed run from the date of granting. The new warrant may be granted for failure to pay the same sum of aliment and expenses as that due at the time of the former application, or any balance of it left, or any aliment afterwards accruing under the decree.[3]

*Execution of Warrant.*—In terms of an order by the Lord Advocate, warrants are executed by police constables.

*Effect of Warrant.*—Imprisonment does not operate in any way as satisfaction or extinction of the debt, and does not in any way operate so as to interfere with the creditor's other rights and remedies for recovery of the aliment awarded under the decree.[4]

*Aliment of Debtor.*—The creditor does not require to aliment the debtor while in prison, and the latter is treated while incarcerated in every respect as though he had been committed for contempt of Court.[5]

## II. Separation and Aliment


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**Introductory.**—The Act of 1907 makes the jurisdiction of the Sheriff extend to and include actions of separation and aliment, which, as consistorial causes, were by the Act 2 Geo. IV. & 1 Will. IV. c. 69, transferred from the jurisdiction of the old Commissary

[1] Crosbie *v.* Crosbie, 1902, 4 F. 945.

[2] Strain *v.* Strain, 1886, *sup.*, *per* Ld. Pres. Inglis.

[3] Act of 1882, s. 4 (4).

[4] *Ibid.*, s. 4 (5).

[5] *Ibid.*, s. 4 (6); *see* 40 & 41 Vict. c. 53, s. 47.

Courts to that of the Court of Session, and have since that time been competent only in the Supreme Court. With the solitary exception of actions of separation and aliment, consistorial causes are still excluded from the jurisdiction of the Sheriff. While the Act of 1907 thus confers jurisdiction in such actions, it does not, either in its sections or rules, give any indication of the procedure which is to be adopted with reference to them. So far, then, as the terms of the Act are concerned, such actions might be dealt with as ordinary actions. In the Court of Session the procedure adopted with reference to such actions differs in certain respects statutorily from that applicable to ordinary actions, while generally it is governed and regulated by a considerable body of judicial decision. It is hardly open to doubt that the Sheriff must apply to those actions the same law by which in time past they have been governed and regulated in the Court in which alone they have hitherto been competent; had it been otherwise the Act would have said so. It will be assumed therefore in the following pages that the procedure and practice of the Court of Session, so far as they may be applicable or adaptable to the forms and practice of the Sheriff Court, apply to actions instituted in that Court. It is not intended to do more than give a brief summary of the practice and procedure applicable to such actions, for a full account of which reference is made to Lord Fraser's monumental work on the Law relating to Husband and Wife.

**Grounds on which Action Competent.**—An action of separation, or divorce *a mensa et thoro*, in which a conclusion of aliment is usually though not necessarily inserted, is competent to either spouse[1] on the ground of cruelty or adultery, though it is, on account of the difficulty of proving the requisite cruelty, extremely rare on the part of the husband. The usual conclusions in the summons in the Court of Session are (1) that the pursuer is entitled to decree declaring that she (or he) is at liberty to live separately from the defender, and decerning and ordaining the defender to separate from the pursuer *a mensa et thoro*; (2) that the defender should be decerned or ordained to make payment of a certain sum as aliment to the pursuer during their joint lives, or at least so long as they may remain separate; (3) for expenses. Where the husband is the pursuer the second and third of these conclusions is usually omitted. A conclusion for the custody of the pupil children of the marriage is competent.

[1] *See* Nisbet *v.* Nisbet, 1896, 34 S.L.R. 229 (O.H.).

**Service on Defender.**—The action is initiated by writ in the usual way, the form of writ being considered later. By section 10 of the Conjugal Rights Act, 1861, as amended by section 100 of the Court of Session Act of 1868, the writ must be served upon the defender personally, where he is not resident in Scotland, by delivery of a copy of the writ by any person (though he is not a messenger-at-arms or other officer of the law) duly authorised by the pursuer for that purpose. If the Court is satisfied that the defender cannot be found, edictal citation is sufficient; but in every case of edictal citation the writ must be also served on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when said children and next-of-kin are known and are resident in the United Kingdom. Such children and next-of-kin, whether cited or not, and whether resident in the United Kingdom or not, may appear and state defences to the action. Where a defender had left his residence in Scotland for less than forty days, and left no information as to where he had gone, it was held that the Judicature Act creates no presumption that in such circumstances the defender is still resident in Scotland, and therefore that citation in a consistorial cause must in terms of the Conjugal Rights Act of 1861 be made upon him personally.[1]

**Arrestment on the Dependence.**—Where there is a pecuniary as well as a declaratory conclusion, arrestment on the dependence is competent as in any other action containing pecuniary conclusions; it is not however competent, as a rule, to secure future aliment by an arrestment on the dependence.[2]

**Entering Appearance.**—The defender may of course enter appearance in the usual way, but he is not precluded from lodging defences at any time before final judgment by his failure to do so.[3] It is even competent for a defender who has neither entered appearance, lodged answers, nor, though represented at the proof, opposed decree, to appeal against the interlocutor of the Sheriff-Substitute granting decree and to lodge defences in the appeal.[4]

**Form of Writ.**—The main difficulty which is likely to be

[1] Laughland *v.* Laughland, 1882, 19 S.L.R. 645, *per* Ld. Kinnear.

[2] Symington *v.* Symington, 1875, 3 R. 205; Burns *v.* Burns, 1879, 7 R. 355; James *v.* James, 1886, 13 R. 1153.

[3] Watts *v.* Watts, 1885, 12 R. 894; Paul *v.* Paul, 1896, 4 S.L.T. 124, 171 (O.H.); Ross *v.* Ross, 1897, 24 R. 1029; Cathcart *v.* Cathcart, 1899, 1 F. 781; Whyte *v.* Whyte, 1891, 18 R. 469.

[4] Ross *v.* Ross, *sup.*

experienced in adapting the practice of the Court of Session to that of the Sheriff Court is occasioned, firstly, by the form of initial writ introduced by the Act of 1907; and secondly, by the fact that in all consistorial actions, including of course those of separation and aliment, the claim or demand of the pursuer must be established by sufficient evidence, which in practice is construed to mean sufficient evidence independent of the admissions of the parties. There must therefore in such actions invariably be proof, even although the action is undefended or the averments of the pursuer be admitted.[1] In the Court of Session (as in the Sheriff Court prior to 1907) the summons contains the condescendence, in which is incorporated the averments in support of the pursuer's case. When proof, therefore, is allowed in the Court of Session, the proof is that of the averments necessary to support the case which are contained in the condescendence annexed to the summons. But in the Sheriff Court the initial writ contains no condescendence, or even specific averments necessary to instruct a proof, but only a general and vague statement of the nature of the claim or demand which the pursuer makes. If the action is defended by the lodging of a note of appearance by the defender, the condescendence follows. If, then, in an action of separation and aliment, the defender sees fit to lodge a notice of appearance within the days of the induciæ of citation, a course which in this kind of action is not obligatory if he desires to lodge defences, the pursuer must lodge his condescendence within the prescribed period. That condescendence will contain the necessary averments, and a proof of them will be allowed in the usual way. So far there is no difficulty. If, however, the pursuer do not lodge a notice of appearance, the defender cannot as in the ordinary case obtain decree in absence in respect of the pursuer's failure to intimate his intention to defend the action. The position of the pursuer in a consistorial action, differs radically from that of the pursuer in an ordinary action in respect that he is not entitled to decree in the absence of the defender as a matter of right. The fact that the pursuer chooses to abstain from defending the action by lodging a notice of appearance cannot be construed as meaning that he has no defence to offer, since he is entitled to lodge his defence at any stage of the cause; nor can it be construed as

[1] Muirhead *v.* Muirhead, 1846, 8 D. 786; Macfarlane *v.* Macfarlane, 1847, 9 D. 500.

meaning that the granting of the decree which pursuer craves is merely deferred until such time as he may, by appropriate evidence, substantiate the claim which he makes in his initial writ. He is not entitled to decree at all, simply because he states a claim to which no defence is offered; he becomes entitled to decree not because, as in the ordinary case, his opponent has failed or does not see fit to defend the action, but solely because he is able to satisfy the Court that his averments are founded on relevant facts. But unless the initial writ is so expressed as to practically include a condescendence, there are, in an action in which no appearance is entered, no relevant or sufficient facts which can be remitted to probation. It would appear, in such circumstances, the height of inconvenience if not of absurdity to fix a diet for the proof of averments which have never been stated, and which when stated might turn out to be utterly irrelevant. There does not appear to be any authority in the Act for the ordering of a condescendence to be lodged in cases such as this where no appearance is entered. On the other hand, there does not appear to be anything which makes such a course incompetent or inadvisable. Indeed, one of two courses seems imperative—either that the initial writ should be so expressed as to contain virtually everything (except the pleas-in-law) which is included in a summons in the Court of Session, or that the Sheriff should *ex proprio motu* order a condescendence to be lodged within a reasonable time. It may be said with regard to the second course, that the requirement that the pursuer should lead evidence sufficient to substantiate her grounds of action does not necessarily infer that a condescendence need be lodged at all, since all that the pursuer requires to do in order to fulfil the condition precedent to the granting of the decree, is to satisfy the Court that she has a *prima facie* case, which, in the absence of a contradictor, must be presumed to be a real case. Such a contention would, however, appear to be based on a misapprehension of the essential character of the action, and on an omission to reflect that from the mere fact that no appearance has been lodged, it cannot be inferred that the action will not be defended. The meaning of the provisions of the statute, on the contrary, would appear to be that it is immaterial, in one sense, to the success of the pursuer, whether there be a contradictor or not, and for that very reason that she must prove her case not merely *prima facie*, but in exactly the same way as if there had been a

contradictor. While no doubt it may be true that where the defender in a consistorial cause does not lodge a notice of appearance, and subsequently does not appear at the diet of proof, the evidence led will in the general case be less ample and exhaustive than where the case is contested, it is none the less true that the truth of the pursuer's averments must be established by sufficient competent evidence to satisfy the Sheriff, whether the case be contested or not, for the reason that the law does not sanction *bona gratia* separations. Where, therefore, a proof is allowed it must be a proof of the pursuer's averments, the fact that such an expression includes allowing a conjunct probation being immaterial.[1]

**Averments necessary.**—The averments necessary to support the pursuer's claim differ according as the action is based on cruelty or adultery.

*Cruelty.*—In the former case they must be specific as to the date and place and the description of the acts complained of. It is impossible to define precisely what amount of maltreatment amounts to cruelty such as to justify a decree of separation. But personal violence, such as assaults upon the woman, threats of violence which induce the fear of immediate personal danger, maltreatment of her person so as to injure her health, are sufficient grounds to justify a decree of divorce *a mensa et thoro*.[2] But the remedy may be extended to cases where the cruelty falls short of such severity, as where, for example, the husband without any violence, or the threat of any violence, to his wife, without any maltreatment endangering her life or health or leading to an apprehension of such danger, exercises tyranny, constantly insults or vituperates his wife, or makes use of scornful language towards her in the presence of her family, her children, her relations or her friends, and so holds her up to the contumely of the world.[3] Habitual intoxication, coupled with such conduct as puts the wife in fear of personal injury, is sufficient evidence of cruelty,[4] though mere habitual intoxication by itself is not.[5] But the fact that the wife or husband is a habitual drunkard within the meaning of section 3 of the Habitual Drunkards Act of

[1] *See* contrary opinion in Grant *v.* Grant, 1908, 24 Sh. Ct. Reps. 114.

[2] Paterson *v.* Paterson, 1850, 7 Bell's Ap. 337, *per* Ld. Brougham; Macfarlane *v.* Macfarlane, *sup.*; Stewart *v.* Stewart, 1870, 8 M. 821.

[3] Paterson *v.* Paterson, *sup.*, *per* Ld. Brougham.

[4] M'Gaan *v.* M'Gaan, 1880, 8 R. 279.

[5] Fulton *v.* Fulton, 1850, 12 D. 1104.

1879 is, if established, equivalent to cruelty.[1] The communication of venereal disease has been held sufficient.[2] A false charge of criminal immorality, if made by one spouse against another and persisted in, is cruelty, and a good ground for decree of separation and aliment if it results in injury or reasonable apprehension of injury to bodily (not mental) health of the person accused.[3] But mere austerity of temper, petulance of manner, rudeness of language, want of civil attention and accommodation, and even occasional sallies of temper, though productive of great domestic misery, do not amount to legal cruelty.[4]

*Adultery.*—The averments must be specific (*a*) as to the time, place and mode of marriage[5]; (*b*) as to the husband's domicile, should there be room for doubt with reference to jurisdiction; and (*c*) as to the circumstances of the act or acts of adultery founded upon. Continuous co-habitation for a specified period, or the time and place of at least one act of adultery, and the name of the person with whom it is alleged to have been committed, must be stated as precisely as it is in the pursuer's power to do so[6]; if the paramour's name be unknown, the cause of its being unknown and the circumstances proving adultery must be clearly averred. An extract conviction of rape, coupled with the production of letters from the criminal in which he referred to his imprisonment without denying its justice, are sufficient to establish the fact of adultery.[7]

**Defences Competent.**—The defences, like the averments, differ according as the ground of action is cruelty or adultery.

*Cruelty.*—Among the most common defences are—(1) Denial of the acts of cruelty libelled, or that those averred are relevant or sufficient to support the action. (2) That the wife is the guilty party, though if cruelty on the part of the husband be proved it is no defence that the wife has equally been guilty of cruelty or misconduct. Such a defence may, however, have a material effect on the other conclusions. A defence of cruelty established by the

[1] Licensing Act, 1903, S. 73; Isles *v.* Isles, 1906, 14 S.L.T. 118 (O.H.).

[2] Strain *v.* Strain, 1885, 13 R. 132.

[3] Aitchison *v.* Aitchison, 1902, 10 S.L.T. 219 (O.H).

[4] Evans *v.* Evans, 1 Hagg. Consist. Reps. 37, *per* Ld. Stowell.

[5] Lacy *v.* Lacy, 1869, 7 M. 369; *see* Sharp *v.* Sharp, 1898, 25 R. 1132.

[6] Walker *v.* Walker, 1871, 9 M. 1091; Fullerton *v.* Fullerton, 1873, 11 M. 720; Tulloh *v.* Tulloh, 1861, 23 D. 639.

[7] Galbraith *v.* Galbraith, 1902, 9 S.L.T. 291 (O.H.).

wife in answer to an action of divorce by her husband on the ground of desertion is not *res judicata* in an action by her for separation and aliment.[1] (3) That subsequent to the acts complained of the spouses have been reconciled. This defence, though similar to condonation in an action of divorce, differs from it in this respect, that it is in its nature conditional and dependent on the permanent discontinuance of the erring party of those acts of violence of which he had formerly been guilty, whereas an act of condonation effaces as a ground of action all previous breaches of the marriage vow.[2] Acts of cruelty committed after pursuer has left defender may be considered, and an extra-judicial agreement to separate is not a bar to obtaining decree in an action of separation.[3]

*Adultery.*—The common defences are—(1) Denial of the adultery, the burden of proving which rests on the pursuer. A single witness to each fact may be sufficient, and such witness need not be an eye-witness, but the facts must be proved so as to leave no reasonable doubt of the defender's guilt. (2) Condonation, expressly by writing or in words, or implied by facts and circumstances,[4] of acts of adultery of which the condoner is fully cognisant.[5] Renewal of conjugal intercourse subsequent to and in the knowledge of the adultery, is the most usual ground from which condonation may be inferred, though one single act of conjugal intercourse, if proved, is sufficient.[6] A condoned act of adultery cannot be founded on as a substantive ground for separation.[7] But acts of cruelty which have been condoned are good evidence to colour later acts, which, though harsh, would not in themselves be sufficient.[8] (3) Long delay in bringing the action after knowledge of the defender's guilt, though in itself no bar to the action, may in particular circumstances make up for the weakness or absence of the other elements necessary to condonation.[9] (4) Lenocinium or connivance, when the husband is accessory to, or participant in, the act or acts of adultery committed by his

[1] Stevens *v.* Stevens, 1882, 9 R. 730.

[2] Macfarlane *v.* Macfarlane, 1849, 11 D. 541, *per* Ld. Fullerton; Watson *v.* Watson, 1874, 12 S.L.R. 78.

[3] Martin *v.* Martin, 1895, 3 S.L.T. 226 (O.H.).

[4] Collins *v.* Collins, 1884, 11 R. (H.L.) 19; Robertson *v.* Robertson, 1888, 15 R. 1001.

[5] Ralston *v.* Ralston, 1888, 8 R. 371.

[6] Wemyss *v.* Wemyss, 1866, 4 M. 660; Edgar *v.* Edgar, 1902, 4 F. 632.

[7] Smith *v.* Smith, 1904, 12 S.L.T. 560 (O.H.).

[8] Smeaton *v.* Smeaton, 1900, 2 F. 837.

[9] Hellon *v.* Hellon, 1873, 11 M. 290.

wife, or is directly the cause of the occasion of her lapse from virtue.[1] (5) Recrimination is no bar to an action of divorce, or of separation and aliment, though mutual guilt may affect the question of the amount of aliment for which the wife may get decree.

**Effect of Decree.**—Section 6 of the Conjugal Rights Act of 1861 provides that, after a decree of separation *a mensa et thoro* obtained at the instance of the wife, all property which she may acquire or which may come to or devolve upon her, shall be held as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried; and, on her decease, the same shall, in case she shall die intestate, pass to her heirs and representatives in like manner as if her husband had been dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife, while so separate, shall be capable of entering into obligations and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action after the date of such decree of separation and during the subsistence thereof; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use.

**Interim Award of Aliment** may be granted, but to justify such an award, which will not as a rule be granted before defences are lodged,[2] there must be a *prima facie* case disclosed and necessitous circumstances on the part of the wife.

**Expenses.**—There are certain special rules as to expenses in

[1] Wemyss *v.* Wemyss, *sup.*, *per* Ld. J.-C. Inglis; Marshall *v.* Marshall, 1881, 8 R. 702; Hunter *v.* Hunter, 1883, 11 R. 359; Fletcher *v.* Fletcher, 1902, 10 S.L.T. 188 (O.H.); Thomson *v.* Thomson, 1908, S.C. 179.

[2] Pirrie *v.* Pirrie, 1903, 10 S.L.T. 598.

consistorial causes. In actions of separation by the husband, the wife is, in general,[1] entitled to her expenses, whether she is successful or not, unless she happens to be possessed of separate estate, in which event she will usually get her expenses only if successful, and if unsuccessful may be found liable in her husband's expenses.[2] If the action is settled the wife's agent will not be sisted to enable him to recover his expenses against the husband, the proper course being in general for the agent to sue the husband for their amount in a separate action.[3] Where the wife has obtained a judgment in her favour she is entitled to expenses to enable her to maintain it on appeal.[4] If the judgment be against her, she is entitled to such expenses only if she has a probable ground of defence.[5] Expenses may be awarded as between agent and client, but if the wife be possessed of private means they will generally be awarded only as between party and party.[6]

**Interim Award.**—An interim award of expenses may be made at the commencement of the action, or at any stage during its progress. The motion is for expenses necessary for the conduct of the cause, but the Court may refuse more than the agent's outlay. To justify the award there must as a rule be a *prima facie* case disclosed.[7]

**Conclusion for Aliment.**—Where the action is at the instance of the wife there is usually a conclusion for aliment.[8]

[1] *See* Kirkhope *v.* Kirkhope, 1896, 4 S.L.T. 182 (O.H.).

[2] Milne *v.* Milne, 1885, 13 R. 304; Thorburn *v.* Thorburn, 1866, 1 S.L.R. 191; Murray *v.* Murray, 1893, 1 S.L.T. 260 (O.H.); Elliott *v.* Elliott, 1893, 1 S.L.T. 261 (O.H.); Liddell *v.* Liddell, 1903, 11 S.L.T. 488; M'Ewan *v.* M'Ewan, 1903, 11 S.L.T. 96; Thomson *v.* Thomson, *sup.*

[3] Smith *v.* Smith, 1871, 9 M. 538; Clark *v.* Henderson, 1875, 2 R. 428; Wales *v.* Wales, 1901, 9 S.L.T. 371; Riddle *v.* Riddle, 1904, 12 S.L.T. 361 (O.H.).

[4] Symington *v.* Symington, 1874, 1 R. 1006; Montgomery *v.* Montgomery, 1880, 8 R. 26.

[5] Hoey *v.* Hoey, 1884, 11 R. 905.

[6] Mackellar *v.* Mackellar, 25 R. 883; Grant *v.* Grant, 1905, 43 S.L.R. 109; A. B. *v.* C. D., 1906, 8 F. 973.

[7] Symington *v.* Symington, *sup.*; Mitchell *v.* Mitchell, 1893, 1 S.L.T. 141; Gunn *v.* Gunn, 1897, 5 S.L.T. 56 (O.H.); Linder *v.* Linder, 1902, 4 F. 465; M'Ewan *v.* M'Ewan, *sup.*

[8] *See* Action of Aliment, *sup.*

# CHAPTER XXXII

## ACTIONS BETWEEN EMPLOYERS AND WORKMEN

I. Actions based upon Common Law

II. Actions under the Employers' and Workmen's Act, 1875

III. Actions under the Employers' Liability Act of 1880 or alternatively at Common Law

IV. Claims for Compensation under the Workmen's Compensation Act, 1906

### I. Actions based upon Common Law


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**Nature and Grounds of Action.**—While an employee is held to contemplate and take the chance of all ordinary risks properly incident to the particular employment in which he engages, the contract of service imposes on the employer at common law the duty of so conducting his business as not recklessly or negligently to endanger the lives or limbs of his employees. The foundation of any claim therefore made by an employee against his employer for reparation in respect of personal injuries sustained in the course of his employment must be the negligence of the employer in failing to exercise such reasonable care or to take such reasonable precautions as he is by law bound to take or exercise towards those in his employment, the precise care or precaution which he is bound to exercise varying to some extent according to the nature of the occupation in which the employee is engaged.[1] But to found a claim against the employer, the negligence of which he is alleged or proved

[1] Wilson *v.* Merry & Cuninghame, 1890, 27 S.L.R. 687; Jeffrey *v.* 1868, 6 M. (H.L.) 84; Gavin *v.* Rogers, Donald, 1901, 9 S.L.T. 199; Bruce *v.* 1889, 17 R. 206; Douglas *v.* Gray, Macfarlane, 1903, 10 S.L.T. 529.

to be guilty, must have been the proximate cause of the accident in respect of which reparation is claimed.[1] Contributory negligence on the part of the employee is therefore a good defence to a claim at common law, unless the employee is able to show that, while contributing by his carelessness or negligence to the occurrence of the accident, the actual or proximate cause of the accident was the negligence of the employer or of those for whom he is in law responsible subsequent in point of time to that of which he was contributory.[2] But if, while the employer's negligence is proved, the accident was not merely contributed to but solely caused by the fault of a fellow-workman, no action for reparation for injuries received in consequence of such fellow-workman's fault is maintainable by the employee at common law.[3] The liability of the employer exists, however, only so long as the employee is "engaged in his employment," according to the fair interpretation of those words, in the construction of which the Courts have exercised some latitude in favour of the employee, and ceases so soon as the relation between the parties, considered solely with reference to the time at which the inquiry is received, ceases to be that reciprocally between employer and employed. When, therefore, an employee goes to his employer's premises outwith the hours of work for some purpose of his own wholly unconnected with his employment and receives an injury, the employer is no longer responsible, not solely, it is conceived, because the presence of the employee cannot be justified by any legitimate excuse, but because at the time the reciprocal relation of employer and employee no longer exists, either actually or constructively. At the same time it must be admitted that where the employee, while actually in the course of his employment, performs acts which cannot strictly be classified as acts of duty towards either his employer or his fellow-employees, and which are no part of his contract of service, the Courts have not been slow to interpret the expression "in the course of his employment" somewhat liberally in favour of the employee.[4]

[1] Mackay *v.* John Watson, Ltd., 1897, 24 R. 383; Greer *v.* Turnbull & Co., 1891, 19 R. 21.

[2] Wilson *v.* Wishaw Coal Co., 1883, 10 R. 1021; Heaney *v.* Glasgow Iron Co., 1898, 25 R. 903.

[3] Rooney *v.* Allan, 1883, 10 R. 1224; Robertson *v.* Linlithgow Oil Co., 1891, 18 R. 1221; Baxter *v.* Abernethy & Co., 1893, 21 R. 159; Farnham *v.* New Bank Coal Co., 1896, 23 R. 722.

[4] *See* Sweeney *v.* M'Gilvray, 1886, 14 R. 105; Wilkinson *v.* Kinneil Coke Co., 1897, 24 R. 1001; Kelly *v.* Glebe Sugar Co., 1893, 20 R. 833.

**Employers' Obligations.**—The obligations which at common law are imposed upon the employer are: (1) To provide and maintain materials reasonably fit and sufficient for the work.[1] In connection with the provision and maintenance of suitable material there is a duty on the employer to satisfy himself by periodical inspection that the material provided is reasonably adequate for the work for which it is intended; he will not, however, be responsible for injuries caused or occasioned through a latent defect in his materials or appliances, provided such defect could not be ascertained by a reasonably careful inspection undertaken by a competent and qualified person, the *onus* of proof being on him.[2] Where, however, the material or appliances are suitable, the employer is not responsible for injuries occasioned to an employee by reason of their being put to a use for which they were not intended.[3] There is, however, no duty on an employer to use absolutely the newest and safest appliances, if those supplied are reasonably adequate and safe for the purpose for which they are intended.[4] (2) To keep the premises in a reasonably safe condition, so far as it is consistent with carrying on the work, and to conduct the business with such care and precaution as to occasion the minimum of danger to his employees. In connection with this duty it is incumbent on the employer to fence all machines which, in the absence of fencing, might occasion danger to his employees, and to maintain the fencing so long as the machine continues to be used.[5] (3) To exercise reasonable care in the selection of competent employees, a rule which follows as a corollary from the proposition that the employer is not responsible to one employee for the fault or negligence of his fellow-servant.

**Employees' Duties.**—The employee in entering the service of his employer is understood to undertake all risks which are usually or naturally associated with the kind of occupation in which

[1] Rothwell *v.* Hutchison, 1886, 13 R. 463; Welsh *v.* Moir, 1885, 12 R. 590; Macdonald *v.* Wylie & Son, 1898, 1 F. 339.

[2] Gavin *v.* Rogers, 1889, 17 R. 206; Irwin *v.* Dennystoun Forge Co., 1885, 22 S.L.R. 379; Robinson *v.* John Watson, Ltd., 1892, 20 R. 144; M'Inulty *v.* Primrose, 1897, 24 R. 442.

[3] Wilson *v.* Merry & Cuninghame, 1868, 6 M. (H.L.) 84; Gordon *v.* Pyper, 1892, 20 R. (H.L.) 23; Stanforth *v.* Burnbank Foundry Co., 1887, 24 S.L.R. 722.

[4] Moore *v.* Ross, 1890, 17 R. 796; M'Gill *v.* Bowman & Co., 1890, 18 R. 206.

[5] Murray *v.* Merry & Cuninghame, 1890, 17 R. 815; Milligan *v.* Muir & Co., 1891, 19 R. 18.

he is about to be engaged, and of which he is or ought to be cognisant.[1] It follows, therefore, that the employee must exercise the judgment of an ordinarily reasonable and careful person to prevent injury to himself, and to cease working on the occurrence of manifest or even anticipated danger.[2] But if an employee chooses voluntarily to undertake a risk, the nature of which is disclosed to him and of which he is thoroughly cognisant, no liability attaches to the employer in consequence of an accident to the employee resulting from the risk so undertaken.[3]

**Collaborateur.**—One of the risks incident to every occupation which at common law the employee takes upon himself is that of being injured through the carelessness of a fellow-employee, engaged in the same occupation, the safety of the one employee being in the ordinary and natural course of things dependent on the other, and both engaged in working in one interest and for the benefit of the same employer.[4] In accordance with the principle just enunciated, the employer is not responsible to his employee for an injury occasioned through the fault or negligence of his fellow-employee, provided that in the selection of the other employees whom he associates in the conduct of the business or occupation with the injured employee, he has exercised reasonable care to ensure that they are possessed of ordinary skill and prudence and that they are otherwise competent. This doctrine, known as that of *collaborateur*, was established in the law of Scotland by the decision of the House of Lords in the case of *Reid* v. *Bartonshill Coal Co.*,[5] and was, by the case of *Wilson* v. *Merry & Cuninghame*,[6] extended so as to apply to all workmen engaged in a common employment, without distinction of grades or classes, and including a foreman or manager. In subsequent cases[7] the doctrine was still

[1] Rooney *v.* Allan, 1883, 10 R. 1224; Bruce *v.* Barclay, 1890, 17 R. 811; Wright *v.* Dunlop & Co., 1893, 20 R. 263; Loughney *v.* Cal. Rly. Co., 1902, 4 F. 401; Bruce *v.* Macfarlane, 1903, 10 S.L.T. 529.

[2] Crichton *v.* Keir, 1863, 1 M. 407; Cook *v.* Bell, 1857, 20 D. 137; Loughney *v.* Cal. Rly. Co., *sup.*

[3] Thomas *v.* Quatermaine, 1887, 18 Q.B.D. 685; Smith *v.* Maryculter Sch. Bd. 1898, 1 F. 5; Smith *v.* Baker, L.R. 1891, Ap. Ca. 325; Wilkinson *v.* Kinneil Coke Co., 1897, 24 R. 1001.

[4] M'Callum *v.* N. B. Rly. Co., 1893, 20 R. 385; Johnson *v.* Lindsay & Co., L.R. 1891, A.C. 371; Connolly *v.* Young's Paraffin Oil Co., 1894, 22 R. 80; Johnson *v.* Lindsay & Co., L.R. 1891, A.C. 371.

[5] 1858, 3 Macq. 268.

[6] 1868, 6 M. (H.L.) 84.

[7] Woodhead *v.* Gartness Mineral Co., 1877, 4 R. 469; Wingate *v.* Monkland Iron Co., 1884, 12 R. 91; Maguire *v.* Russell, 1885, 12 R. 1071; Congleton *v.* Angus, 1887, 14 R. 309.

further extended so as to limit the employer's responsibility for injuries occasioned to an employee, to cases where the person injured was a stranger in a position external to the master and his servants, other cases being governed by the ordinary rule, *culpa tenet suos auctores.*

**Competency of Action in Sheriff Court.**—All actions by employees against their employers for reparation in respect of injuries sustained by them in the course of their employment, based upon fault at common law, may competently he raised in the Sheriff Court, and if the amount claimed does not exceed £50, must be raised in that Court exclusively. The action proceeds in all respects in accordance with the rules applicable to other actions instituted in the Sheriff Court.

**Removal for Jury Trial to Court of Session.**—In cases originating in the Sheriff Court (other than claims by employees against their employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act, 1880, or alternatively under that Act or at common law) where the claim is in amount or value above £50, and an order has been pronounced allowing proof (other than an order for proof to lie *in retentis* or for the recovery of documents), either party who conceives that the cause ought to be tried by jury, may require that it be remitted to the Court of Session for that purpose. The action will thereafter be tried by jury in the Court of Session, unless that Court is of opinion that it is unsuitable for that mode of trial, in which case it has the power to remit the case back to the Sheriff, or to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends.[1]

## II. Actions under the Employers and Workmen Act, 1875.[2]


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**Nature and Scope of Act.**—The proceedings between employers and their workmen or apprentices being actions founded on contract,

[1] Act, s. 30; *see infra*, Appeal for Jury Trial.

[2] Incidentally, it is interesting to notice that in the definition clause the Act makes reference to the "Ordinary" Court as distinct from the S. D. Court.

are in general actions of the ordinary kind. In certain cases, however, the powers of the Sheriff in dealing with disputes between employers and workmen have been materially enhanced by the Act of 1875. As the legislation introduced by the Act is remedial in character, it would appear to be the duty of the Court to extend the benefits of the Act to all cases of dispute arising out of or incidental to the relation of employer and workman, and falling within the scope of its provisions, whether the Act be specifically founded on in the pleadings or not.[1]

**Definition of Workman.**—The Act applies to all proceedings before the Sheriff, either in the Ordinary or Small Debt Court, in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such. The expression "workman" is, however, used in the Act in a somewhat restricted meaning. Seamen (who were left to be dealt with under the Merchant Shipping Acts, under which the proceedings are more of a penal character)[2] and domestic and menial servants[3] (who are left to the common law) are expressly excluded from the operation of the Act. "Workman" includes any person who, being a labourer, servant in husbandry (which has been held to include a woman serving as kitchen-woman and byre-woman,[4] but not a person whose duties are generally those of a farm-bailiff[5]), journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.[6] Under various decisions[7] "workman" as defined in the Act has been held to include the conductor of a tramway car,[8] the fireman on a vessel plying only on an inland canal, a potter's printer who employed servants of his own to assist him,

[1] *See* Coghill *v.* Storen, 1877, 1 Guthrie's Sel. Ca. 373.

[2] The Act was, however, subsequently by the Merchant Seamen Act of 1880, s. 11, extended to include seamen and sea apprentices; *see* Corbett *v.* Pearce, L.R. 1904, 2 K.B. 422.

[3] A potman in a public-house has been held to fall within the category; Pearce *v.* Lansdowne, 1893, 62 L.J.Q.B. 441.

[4] Clark *v.* M'Naught, 1846, Arkley, 33.

[5] Davies *v.* Berwick. 1861, 30 L.J. M.C. 84.

[6] Act of 1875, s. 10.

[7] *See* Umpherstone's Law of Master and Servant, p. 294.

[8] Wilson *v.* Glasgow Tramways Co., 1878, 5 R. 981.

a carter whose duty was to load and unload as well as drive a cart, but not a salesman, the conductor of an omnibus, or the driver of a tramway car,[1] a grocer's assistant, a goods guard on a railway, a hairdresser, or a person employed to assist his employers as a practical working mechanic.

**Actions in Ordinary Court.**—(*Workmen*).—Where there is a dispute in the Ordinary Court to which the provisions of the Act apply (which may be a claim for damages for breach of contract,[2] for penalty stipulated in a contract,[3] or for damages for injuries to the master's property),[4] the Sheriff is authorised to (1) adjust and set off all claims and counter-claims, whether liquid or illiquid, for wages, damages, or otherwise; (2) rescind the contract, apportion wages, and award damages (the power so conferred being not limited to the future, and the contract may be rescinded though the service has terminated)[5]; and (3) in place of awarding damages, if both parties are willing, accept security for the performance of the contract.[6] The action commences by initial writ in the usual way, and is carried through in every respect according to ordinary procedure.

**Actions in Small Debt Court.**—(*Workmen.*)—The Act applies to disputes brought in the Small Debt Court where the sum claimed does not exceed £10. The Sheriff in such actions is empowered to exercise the powers conferred on him with relation to actions in the Ordinary Court, except that he cannot make any order for payment of, nor require security for, a sum exceeding £10 (exclusive of costs). The action proceeds according to the ordinary form of action in the Small Debt Court. No notice is required of any claim of set-off or counter-claim.[7] The Act authorises the Sheriff to pronounce all orders necessary for carrying out its provisions.[8] There is no review of the Sheriff's decision.[9]

*Apprentices.*—The apprentices to whom the provisions of the Act

[1] Morgan *v.* London Omnibus Co., 1884, 13 Q.B.D. 832; Cook *v.* North Metrop. Tramways Co., 1887, 18 Q.B.D. 683.

[2] James *v.* Evans, L.R. 1897, 2 Q.B. 180.

[3] Buxton Lime Firms Co. *v.* Howe, L.R. 1900, 2 Q.B. 232.

[4] Hindley v. Haslam, 1878, 3 Q.B.D. 481.

[5] Wilson *v.* Glasgow Tramways Co., *sup.*; Glasgow Tramways Co. *v.* Dempsay, 1877, 3 Couper (J.) 440.

[6] Act of 1875, s. 3.

[7] A. S. 29th Jan. 1876.

[8] Act of 1875, s. 14.

[9] Wilson *v.* Glasgow Tramways Co., *sup.*

apply are those upon whose binding either no premiums or a premium less than £25 has been paid, and those bound under the provisions of the Acts relating to the relief of the poor. Under the Merchant Shipping Act of 1880 the benefits of the Act were extended to apprentices to sea service. In disputes between apprentices and their employer arising out of or incidental to their relation as such, the Sheriff has the same powers as in the case of disputes between workmen and their employers, and in addition he may (1) order the apprentice to perform his duties under the apprenticeship; and (2) when he rescinds the contract, order repayment of the whole or any part of the premium. On failure to obey the former order, the apprentice, on the lapse of not less than a month from its date, may be ordered to be imprisoned for a period not exceeding fourteen days, and the order may be renewed from time to time.[1] The cautioner for the apprentice, if there be one, may be summoned to attend the hearing, and ordered to pay damages not exceeding the limit (if any) to which he is liable under his bond.[2] The Sheriff has power to issue a warrant for his apprehension.[3] The Sheriff also possesses his usual Small Debt power to direct any payment to be made by instalments, but in addition he may rescind or vary the order from time to time.

## III. Actions (*a*) under the Employers' Liability Act, 1880; or (*b*) under that Act or alternatively at Common Law


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**Scope of Act.**—By the Employers' Liability Act of 1880, the object of which was to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service,[4] the common law has been greatly modified in the interest of employees, the general effect of the Act being to extend the liability of the employer to his employees for reparation in respect of injuries sustained by them in the course of their employ-

[1] Act of 1875, s. 6.
[2] *Ibid.*, s. 7.
[3] *Ibid.*, ss. 9, 14.
[4] *See* Nicolson *v.* M'Andrew, 1888, 15 R. 854.

ment, to cases where such injury is the result of negligence on the part of any one to whom the employer has delegated his authority. The liability introduced by the Act is shortly, therefore, to make the employer responsible to his employee for injuries sustained by him in the course of his employment, as though the employee were a stranger and not contractually in the relation of an employee at all.[1] A workman may contract with his employer to be outwith the provisions of the Act.[2]

**The Statutory Provisions.**—Where personal injury is caused to a workman (1) by reason of any defect in the condition of the ways,[3] works,[4] machinery,[5] or plant[6] connected with or used in the business of the employer (provided the defect arose from, or has not been discovered or remedied owing to the negligence of the employer or of some person in his employment and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition); (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (*i.e.* whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour[7]); (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury has resulted from his having so conformed[8]; it is not, however, necessary that the negligence should consist in having given an improper order, though it must have been *causa causans* of the injury,[9] and the order need not be verbal, but may consist merely in an indication of direction[10]; (4) by reason of the Act or omission of any person in the service of the employer, done or made in obedience to the rules or bye-laws of the employer or in obedience to particular instructions

[1] Morrison & Mason *v.* Scot. Emplrs. Liab. Ass. Ltd., 1888, 16 R. 212.

[2] Wright *v.* Howard, Baker, & Co., 1893, 21 R. 25.

[3] Ferris *v.* Cowdenbeath Coal Co., 1897, 24 R. 615; Willetts *v.* Watt, L.R. 1892, 2 Q.B. 92.

[4] Brannigan *v.* Robinson, L.R. 1892, 1 Q.B. 344.

[5] Walsh *v.* Whiteley, 1888, 21 Q.B.D. 371; Tate *v.* Latham, L.R. 1897, 1 Q.B. 502.

[6] Fraser *v.* Hood, 1887, 15 R. 178; Haston *v.* Edin. Tramways Co., 1887, 14 R. 621; Carter *v.* Clarke, 1898, 78 L.T. 76; Thomson *v.* City Glass Bottle Co., L.R. 1901, 2 K.B. 483.

[7] Donnelly *v.* Spencer, 1899, 1 F. 1107.

[8] Campbell *v.* Calderbank Steel Co., 1898, 25 R. 753; Brown *v.* Furnival, 1896, 23 R. 492; Wilson *v.* Cal. Rly. Co., 1899, 2 F. 319.

[9] Wild *v.* Waygood, L.R. 1892, 1 Q.B. 783.

[10] Dolan *v.* Anderson, 1885, 12 R. 1190.

given by any person delegated with the authority of the employer in that behalf (but to entitle the workman to compensation the injury must have resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned. If, however, a rule or bye-law has been accepted as a proper bye-law by one of His Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it is not for the purposes of the Act to be deemed an improper or defective rule or bye-law); or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points,[1] locomotive engine or train[2] upon a railway[3]—the workman, or in case the injury results in death, his legal representatives, and any persons entitled in case of death, have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. But in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or some person superior to himself in the service of the employer (unless he was aware that the employer or superior already knew of the defect or negligence), he loses all right of compensation or remedy against his employer under the Act. The effect of this sub-section is not to abolish the plea of *volenti non fit injuria*, but to make the fact of working in the face of known danger no longer *per se* sufficient to bar the claim for compensation.[4]

**Notice of Injury** must be given within six weeks,[5] and the action commenced within six months,[6] from the occurrence of the accident causing injury, or in case of death within twelve months from the time of death: in the latter case a reasonable excuse[7] for want of notice (though not for not raising the action[8]) is

[1] Gibbs *v.* G. W. Rly. Co., 1884, 12 Q.B.D. 208.

[2] M'Cord *v.* Cammell, L.R. 1896, A.C. 57.

[3] Doughty *v.* Firbank, 1883, 10 Q.B.D. 358.

[4] M'Monagle *v.* Baird, 1881, 9 R. 364; Haston *v.* Edin. Tramways Co., 1887, 14 R. 621; Smith *v.* Baker, 1891, L.R.A.C. 325.

[5] M'Donagh *v.* M'Lellan, 1886, 13 R. 1000; Trail *v.* Kelman, 1887, 15 R. 4; M'Leod *v.* Pirie, 1893, 20 R. 381; Thomson *v.* Baird, 1903, 6 F. 142.

[6] Clark *v.* Adams, 1885, 12 R. 1092.

[7] Connolly *v.* Young's Paraffin Oil Co., 1894, 22 R. 80; M'Fadyen *v.* Dalmellington Iron Co., 1897, 24 R. 327.

[8] Johnston *v.* Shaw, 1883, 21 S.L.R. 246.

admitted. Section 7 of the Act prescribes how the notice must be given; it must be in writing,[1] and contain specific particulars of the accident,[2] though not necessarily of the cause of the accident,[3] or ground of action.[4] It need not necessarily be given by hand or by registered letter,[5] and is not invalidated by the omission of particulars, such as the date of the accident.[6]

**Compensation recoverable.**—The amount which may be recovered under the Act is a sum not exceeding the estimated earnings[7] of a workman of the same grade and district during the three years preceding the injury, under deduction of any sum paid to the workman or his representatives by way of penalty under an Act of Parliament in respect of the same cause of action.

**Jurisdiction of Sheriff Court.**—By the provision of section 6 of the Act of 1880, every action for recovery of compensation brought under it required to be raised in the Sheriff Court. Such actions might, however, prior to the Act of 1907, be appealed to the Court of Session, either under section 9 of the Sheriff Courts Act of 1877 (whatever was the value at stake), or under section 40 of the Judicature Act, 1825 (where the action was for more than £40), and in either case was tried by jury, unless special cause was shown to the contrary.[8] If the action were under the Act, or alternatively at common law, the statutory removal removed both branches of the action.[9] Section 14 of the Workmen's Compensation Act of 1906, however, provides that an action in respect of injuries caused by accident arising out of and in the course of his employment, raised by a workman against his employer in the Sheriff Court, and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under that Act, cannot any longer be removed or appealed to the Court of Session for trial. Such actions, therefore, since the passing of the Workmen's

[1] Moyle *v.* Jenkins, 1881, 8 Q.B.D. 116.

[2] Keen *v.* Milwall Dock Co., 1882, 8 Q.B.D. 482.

[3] Thomson *v.* Robertson, 1884, 12 R. 121.

[4] Clarkson *v.* Musgrave, 1882, 9 Q.B.D. 386.

[5] M'Govan *v.* Tancred, Arrol, & Co., 1886, 13 R. 1033.

[6] Carter *v.* Drysdale, 1883, L.R. 12 Q.B.D. 91.

[7] Noel *v.* Redruth Co., L.R. 1896, 1 Q.B. 453.

[8] Paton *v.* Niddrie Coal Co., 1885, 12 R. 538; M'Avoy *v.* Young's Paraffin Oil Co., 1881, 9 R. 100.

[9] Morrison *v.* Baird, 1882, 10 R. 271.

Compensation Act of 1906, may competently be tried only in the Sheriff Court, by proof in the ordinary way, and subject to the ordinary rights of appeal. The Act of 1907 provides an alternative but optional mode of trial for all such cases where the amount sued for exceeds a certain fixed sum. Section 31 of that Act provides that in any action raised in the Sheriff Court by an employee against his employer concluding for damages under the Employers' Liability Act of 1880, or alternatively under that Act or at common law, in respect of injury caused by accident *arising out of and in the course of his employment*, where the claim exceeds £50, either party, so soon as proof has been allowed or within six days thereafter, may require that the cause shall be tried before a jury, in which case the Sheriff shall appoint the action to be tried before a jury of seven persons. To bring such cases within the operation of the Statute there must be averments that the accident in respect of which compensation is sought, arose out of and in the course of the workman's employment; but since, to make an action relevant at the instance of an employee against his employer, concluding for damages for personal injuries, it must contain such an averment or statements from which such an averment can be clearly inferred, the words italicised may be considered as exegetical and not limiting. Where, however, the claim does not exceed £50, the action, being a summary cause within the definition of the Act, whether based upon fault at common law or under the Employers' Liability Act, or under that Act or alternatively at common law, must be raised and followed through exclusively in the Sheriff Court, according to the ordinary procedure, and subject to the limited right of appeal competent in summary causes.

## IV. The Workmen's Compensation Act, 1906

The Act provides that if in any employment, personal injury by accident, arising out of and in the course of the employment, is caused to a workman, his employer shall, subject to certain defined exceptions, be liable to pay him compensation, the amount of which varies according to circumstances. If any question arises in any proceedings under the Act as to the employer's liability to pay the statutory compensation, the Act provides that the question shall be settled by arbitration in accordance with the provisions of

its second schedule. The arbiter may be a person chosen by the parties mutually, but if they fail to agree upon an arbiter, then the question is settled by the Sheriff, according to the procedure prescribed by the rules of Court. An application to the Sheriff for settlement by arbitration of a claim for compensation, which cannot be made unless some question has arisen between the parties, must state concisely the question which has arisen. While acting as arbiter under the Act, the Sheriff does not exercise his ordinary jurisdiction either as to parties or as to subject-matter, but the application is none the less made to him as arbiter in virtue of the fact that he is the Sheriff, and he acts in the arbitration both as arbiter and as Sheriff. No doubt it is true that the Act might have nominated as arbitrator any one whose commission required him to undertake the duty, but it is equally true that the Sheriff does deal with the application as arbiter by virtue of the fact that he is the Sheriff. It would seem that the Legislature has enjoined upon the Sheriff the undertaking of the duties of arbiter created by the Statute, and it has done so on the basis that an arbitration is conceived as a judicial proceeding competent in the Sheriff Court. That the Legislature did conceive, that in appointing the Sheriff as arbiter under the Act they were devolving upon him duties which fell properly within the scope of his commission, appears to be abundantly clear from the terms of clause 12 of the second schedule of the Act, which makes its administration part of the duties of the Judges of the County Court, that is, in Scotland, of the Sheriffs. No doubt it is true that, as decided by the case of the *United Collieries Ltd.* v. *Gavin*,[1] he cannot, for instance, grant decree by default or on account of the absence of one of the parties. That observation applies, however, equally to more than one case where it is undoubted that the Sheriff is acting as a Judge and not as an arbiter. He cannot, for example, grant a decree of separation and aliment merely in virtue of the fact that the defender fails to appear, nor can he grant warrant to imprison a defender for failure to pay aliment decerned against him unless he is satisfied that the defender's failure to pay has been wilful. And while it is equally true that he does not exercise his ordinary jurisdiction while sitting as an arbiter under the Act, it appears in virtue of the fact that an appeal against his award is competent, so far as he decides a question of law, that the

[1] 2 F. 60.

jurisdiction which he exercises as arbiter does not differ materially in kind or quality, but only in degree, from that which he exercises as Sheriff.

There does not appear to be any room for doubt that applications under the Workmen's Compensation Act to the Sheriff as arbiter were, as civil proceedings competent in the Sheriff Court, specifically intended to fall under the category of summary applications, and that the proceedings were under the provisions of the Act of 1907 intended to commence with the initial writ, the form of which is provided by that Act, with the warrant of service appropriate to that class of actions. The Act of 1906 provided that the application should be in the form provided by the Sheriff Courts Act of 1876, which at the date of its passing was the leading Act in force with reference to the initiation of proceedings in the Sheriff Court. The Act of 1907 has, however, specifically repealed the Act of 1876, and so far as proceedings in the Sheriff Court are concerned that Act has ceased to exist. If, then, an arbitration in a Workmen's Compensation case is a judicial proceeding competent in the Sheriff Court, it must be presented in the form provided by the Act of 1907, the only Act now valid with reference to the forms of procedure in that Court. If it is not such a proceeding, then it would seem there is no particular form in which the application must be presented, and that it might consequently be presented in any form which the applicant chose to adopt. Such a construction of the Act would, however, be tantamount to a *reductio ad absurdum*. The Act of 1907, in repealing the Act of 1876, has not, either in terms or by implication, declared that the forms provided by that Act shall subsist for any purpose whatever. On the contrary, it has expressly provided that such forms shall be no longer competent. Besides, under the rules of the Act of 1907, every "action" initiated in the Sheriff Court must be begun in the form of initial writ prescribed by the Act. The word "action" was defined by Lord President Inglis in a case in which it was maintained that the word, as used in the Sheriff Court Act of 1876, was not sufficiently comprehensive to include all applications made to the Sheriff.[1] The dictum of that illustrious Judge was that the term action included every "case" which came before the Sheriff, and when he used the word "case" as a synonym for "action" it can hardly be doubted

[1] M'Dermott *v.* Ramsay, 1876, 14 S.L.R. 153.

that he meant every civil proceeding competent in the Sheriff Court. Arbitrations under the Workmen's Compensation Act are unquestionably "civil proceedings," and they are equally undoubtedly "competent in the Sheriff Court." They are therefore "actions" in the sense of the Act of 1907.

# CHAPTER XXXIII

## APPOINTMENT OF JUDICIAL FACTORS, TUTORS, CURATORS, AND GUARDIANS

### I. Appointment of Judicial Factors


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**Jurisdiction.**—The jurisdiction of the Sheriff Court in the appointment of judicial factors, which is conferred by the Judicial Factors Act of 1880, is limited both as regards the persons who may be appointed and the amount of property which they may supervise. The powers conferred by the Act of 1880 are exercised under that Act in conjunction with the Judicial Factors Act of 1889, the Act of Sederunt of 14th January 1881, the Pupils' Protection Act of 1849, the Act of Sederunt of 1st February 1850, and the Court of Session Act of 1857. In addition to these there are the regulations issued by the Accountant of Court for the guidance of factors in the performance of their duties.

**Who may be appointed.**—There are only two kinds of factors who may be appointed in the Sheriff Court, those who act *loco tutoris*, and those who act under the name of *curator bonis*. The former take charge of the property of pupils, the latter of that of insane persons.[1] It has, however, been held competent to appoint a *curator bonis* to a minor who is above pupillarity.[2] But there is no power under the Act to appoint factors *loco absentis* to persons incapacitated

[1] Act of 1880, s. 3.

[2] Penney *v.* Scott, 1894, 22 R. 5.

from other causes than insanity, or on trust estates or in partnerships.

**On what Estates.**—The yearly value of the estate on which the factor is appointed must not exceed £100 in all,[1] the word estate being defined as including all property and funds and all rights heritable and moveable.[2] The Sheriff must be satisfied by reasonable evidence as to the value, and insert in his interlocutor appointing the factor a finding on the point, which finding is declared to be final. To ascertain the value, the rent of the heritable property as entered in the Valuation Roll for the time being, and the yearly income on the estimated value of the moveable estate at four per cent. (whether apparently the property is actually yielding more or less at the time), is taken. If the value of the estate cannot be ascertained in either of these ways, then it is ascertained by the Sheriff in such manner as he may think fit.[3] To satisfy the Sheriff that the whole estate of the ward has been disclosed, a certificate by the petitioner's agent to the effect that after due inquiry he has not been able to discover more, is, in practice, generally held sufficient. All the real and personal property belonging to the ward, wherever situated, must be included. The appointment, once made, does not fall in respect that it subsequently appears that the yearly value was wrongly estimated, and that it did *de facto* exceed the statutory limit.[4] No provision is, however, made for the case of the property, though correctly valued at the time, increasing in value beyond the limit at which the Sheriff has statutory jurisdiction.

**Application for Appointment.**—The application is made by writ in the ordinary form,[5] craving specifically for the appointment of a factor *loco tutoris* or *curator bonis* as the case may be, presented in the Sheriff Court of the county in which the pupil, minor, or insane person is resident, the residence referred to being the usual residence, not the place where the pupil, minor, or insane person happens at the time to reside.[6] The writ should specify the particulars of the estate with sufficient accuracy to show that it does not exceed the statutory limit. The application is competent at the instance practically of any one who can show an interest;

[1] Act of 1880, s. 4.
[2] *Ibid.*, s. 2.
[3] *Ibid.*, s. 4 (2) (3).
[4] *Ibid.*, s. 4 (3).
[5] *Ibid.*, s. 4 (1).
[6] *See* Henry, 1896, 12 Sh. Ct. Reps. 121; M'Cormick, 1897, 13 Sh. Ct. Reps. 184.

where one relative applies, the others, equally or more near, should be called as defenders, and in general all the next-of-kin should (if practicable) be made parties either on one side or the other. All near relatives, and all who have interest in the appointment, may appear, and in general should be called, as defenders. While pupils are not usually made parties, insane persons must always be called as parties to the application, either by being made defenders, and being personally served as such, or by having notice of the application personally served on them, either at the petitioner's instance or by the order of the Sheriff; it is indispensable that in some shape the insane person should be made cognisant of what is intended to be done with his property.[1]

**Procedure.**—The subsequent proceedings are conducted summarily, and as nearly as may be in the same way as in the case of a petition under the Pupils' Protection Act before a Lord Ordinary.[2] The first order is for service, intimation, and answers, within a specified period.

*Service and Intimation* is ordered (*a*) upon the walls of the Court, (*b*) to the Accountant of Court, (*c*) to such interested parties as the Sheriff may think proper, and, if necessary, (*d*) by advertisement. The Accountant notifies the Sheriff-Clerk of any other application having been made with reference to the same estate.[3] The service on the defenders and others, if any, may be effected by officer or by registered letter[4]; in the case of lunatics it should be effected personally, and not by post. In the case of defenders outwith Scotland, the service will be edictal on fourteen days' induciæ. The intimation and service should in all cases be accompanied by service copies.

*Where no Answers are lodged* the application is disposed of in absence, but only after due inquiry and not as a matter of course. A decree pronounced in absence cannot be opened up after the lapse of twelve months,[5] a provision which would appear to imply that within twelve months such a decree may be opened up. A petition for recall is therefore probably competent within that period; at any rate, no other mode of review suggests itself which would not be either very inconvenient or very expensive.

*Where Answers are Lodged* parties will be heard thereon, and such

[1] M'Gregor, 1848, 11 D. 285; M'Kechnie, 1890, 27 S.L.R. 261.
[2] Act of 1880, s. 4 (1).
[3] Act of Sed. 1881, ss. 3, 4.
[4] *Ibid.*, s. 3.
[5] Act of 1880, s. 4 (8).

inquiry made as the Sheriff thinks proper. Some difficulty may be experienced in cases like this, as in some other cases which have already been dealt with, in adapting the forms introduced by the Act of 1907 to the provisions of the Act of 1880 and its relative Act of Sederunt. Under the old form of petition contemplated by that Act, the initial writ or petition contained a condescendence and note of pleas-in-law. Answers, therefore, when lodged contained articulate answers to the averments contained in the condescendence. Under the Act of 1907, the application being a summary one, no notice of appearance is lodged. The initial writ itself being merely a statement of the general nature of the pursuer's claim or demand, is not articulate, and contains nothing which can be dignified by the name of a condescendence, and as a consequence no condescendence exists to which answers may be lodged. The answers, therefore, which at this stage can be lodged can only be answers either to the vague statements contained in the initial writ or by anticipation to those which may be contained in any condescendence which may subsequently be ordered. It would therefore appear to be necessary, though the Act contains no authority for the proceeding, for the Sheriff when ordering intimation and service to order the pursuer to lodge a condescendence. In any event it must not be forgotten that, as in the case of more than one action or application in the Sheriff Court which have already been dealt with, the pursuer in an application for the appointment of a judicial factor is not in the position of the pursuer in an ordinary claim for the payment of a sum of money, in respect that he is not entitled to decree merely in virtue of the fact that no defender or contradictor appears to defend the action. While it is true that he does not, like, *e.g.*, the pursuer in an action of separation and aliment, require to substantiate his claim by evidence, it is equally true that he can obtain decree only after the Sheriff has satisfied himself by sufficient inquiry that the application should be granted. If, however, the action is undefended, the only averments on which such inquiry can proceed are those vague general statements contained in the writ, a consideration which would appear to emphasize the necessity for the ordering of a condescendence in the interlocutor in which service is ordered. The Act of 1880 seems to contain inferentially sufficient authority for such a course, in so far as it provides that, while the application is to be disposed of summarily, the proceedings are to be as nearly as may be

the same as in those presented to the Lord Ordinary. In such cases the summons of course contains a full and articulate condescendence, as it was anticipated at the date when the Act of 1880 was passed, the form of petition in the Sheriff Court would also necessarily contain; and if applications in the Sheriff Court are to be dealt with in the same way, it seems impossible to resist the conclusion that the Sheriff must possess, in the shape of a condescendence, the same means for arriving at his judgment as is possessed by the Lord Ordinary. When answers are lodged, they will of course (on the assumption that a condescendence has been ordered and lodged) contain articulate answers to the pursuer's averments, though if a separate statement of facts is indispensable, there appears to be nothing to prevent its being added. Answers may be lodged by any person entitled to defend, whether specifically called as a defender or not. There seems to be nothing incompetent in making up and closing a record, if the difficulty or importance of the questions raised justify such a course, though it is not the practice in the Court of Session.

*Inquiry.*—The nature of the inquiry is left very much to the discretion of the Sheriff. The fact of pupillarity or minority is usually assumed from the statement in the initial writ, but in the case of insanity there must always be evidence. The Sheriff must be satisfied in the first place as to the amount of the estate, and in the second place as to the fitness of the person to be appointed, who may be suggested by the applicant, provided he be a male, of full age, of good character and circumstances, resident in Scotland, and under no disqualification by reason of possessing an interest adverse to that of the ward. As to the mode in which the inquiry is to be made, no general rules can be laid down, as it depends so much upon the facts to be ascertained. In some cases the Sheriff may satisfy himself, in others he may make remits, and in a few he may allow a proof in common form.

*Nomination and Caution.*—When the appointment is made it must be in special terms to the office of factor *loco tutoris*, or *curator bonis*, as the case may be. The person appointed must find caution to the satisfaction of the Sheriff-Clerk within three weeks, unless some other time be fixed in the interlocutor.[1] If caution be not found within that time or within a time prorogated before its

[1] A. S. 1881, s. 5.

expiry, the appointment *ipso facto* falls. There seems no incompetency in the Sheriff, if he thinks right, re-nominating the same person. The mode of finding caution is fully set forth in the Act of Sederunt of 1881, the terms of which it is unnecessary to repeat. The bond of a guarantee society may be accepted.[1] The Accountant allows as a charge against the factory estate (1) the premium paid by the judicial factor, where a company bond of caution is accepted, or such part thereof as he deems proper; and (2) the expense of the necessary procedure in obtaining the approval of a bond of caution or limitation of the amount. The fact of such charge is, however, taken into account by the Accountant in fixing the factor's remuneration.[2] Until caution has been found, the Sheriff-Clerk cannot issue extract, and without it the factor cannot act.[3] After extract, the petition is not taken off the walls, but remains (without falling asleep) for the purpose of having any other applications connected with the estate disposed of.[4]

**The Duties and Powers of the Factor** are detailed in the instructions for his guidance issued by the Accountant of Court, and need not be repeated. The whole of his ward's property is assigned and transferred to him by virtue of the extract of his appointment.[5] It is matter of statutory obligation that he places all sums over £25 in one of the chartered banks.[6] He is under the control of the Accountant, by whom his accounts are audited, and who is bound to report anything irregular to the Sheriff in the same way as in Court of Session appointments he reports to the Lord Ordinary.[7] If the cautioner dies or fails, or if the premiums are not paid, the factor or the Sheriff-Clerk, if he be apprised of the fact, must report it to the Accountant; and new caution must be extracted, or failing it, a new factor must be appointed.[8]

**Incidental Applications.**—All incidental applications are made by note in the original application.[9] Among these applications may be particularly mentioned those for (*a*) special powers, (*b*) renewal, (*c*) recall, and (*d*) discharge. The provisions as to intimation and service of these are generally the same as those for the initial writ.

[1] A. S. 1881, s. 6; A. S. 15th July 1904.
[2] A. S. 15th July 1904.
[3] A. S. 1881, s. 7; *see* Calver *v.* Howard, Baker, & Co., 1894, 22 R. 1.
[4] *Ibid.*, s. 2.
[5] Act of 1889, s. 13.
[6] A. S. 1881, s. 11.
[7] Act of 1880, s. 4 (5); Act of 1889, s. 6.
[8] A. S. 1881, s. 8.
[9] *Ibid.*, s. 2.

*For Special Powers.*—Special powers cannot be applied for till after extract, and when the factor desires to obtain such powers, he must first present a note to the Accountant, and obtain from him a report upon their necessity and propriety, the note and the report being then presented to the Sheriff. After intimation and service and such inquiry as may be necessary, the Sheriff disposes of the application. The usual cases in which such powers are required by factors, are where it is desired to sell, or borrow upon the security of, heritable property, to feu or to lease for periods enduring beyond a year after the expiry of their office, or for a reduced rent, and (in certain cases) to compromise[1] or submit to reference.

*Renewal of Appointment* to the office is necessary where the original nominee has died, gone abroad, resigned, or in any way ceased to hold office. Intimation and service are effected in the same way as in the original case. The Accountant may, if he thinks right, apply for the appointment of a successor to a factor who has died undischarged, or who has otherwise ceased to discharge the duties of his office.[2] Applications for the appointment of a new judicial factor, where the ward has removed outwith the jurisdiction, must be presented in the Sheriff Court in which the original appointment was made.[3]

*Discharge* is, in like manner, obtained by a note in process, which, after being intimated and served like the writ, is transmitted to the Accountant for a report.[4] If the report is satisfactory and the funds are all accounted for or put in safe custody, the discharge is granted and the bond of caution delivered up.

*Recall of Appointment.*—A note for recall may be presented in various circumstances, which it is unnecessary to enumerate. As in most cases such a note is an appeal to the discretion of the Sheriff, no general directions concerning it are possible. In all cases it may be presented to the Court of Session.[5]

**Appeals**—An appeal is competent from the Sheriff-Substitute to the Sheriff where there would be an appeal from the Lord Ordinary to the Inner House if the application had been made in

[1] *See* Scott *v.* Craig's Reps., 1897, 24 R. 462, *per* Ld. Kincairney.

[2] Act, 1889, s. 10.

[3] Rule of Court under Act 1880, sec. 4 (7); Penney, 1893, 20 R. 573.

[4] A. S. 1881, s. 10.

[5] Act of 1880, s. 4 (9); *see* Forrest *v.* Forrest's Factor, 1898, 6 S.L.T. 91.

the Court of Session[1]: there is, however, no appeal from the Sheriff.[2] Appeal is therefore competent against every interlocutor finally disposing of the merits[3]: but there is no appeal against an interlocutory judgment even with leave. The appeal must be taken within eight days from the date of the interlocutor.[3] Where the Sheriff refused an application as incompetent, it was held to be competent to appeal against his judgment to the Court of Session.[4]

## II. Tutors, Curators, and Guardians


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**Choosing Curators.** — Where the father of a minor above the age of puberty has died without naming curators, the minor may choose them. By section 11 of the Judicial Factors Act of 1889, factors *loco tutoris* become *curatores bonis* to their wards on reaching minority, and are authorised to continue the administration of the ward's estate until he reaches majority, or until he chooses curators. In order to choose curators, the minor raises an edict of curatory, in which are called two of the nearest-of-kin on the father's and mother's sides respectively, and all others having interest, to hear and see the curators chosen, and the curatorial inventories given up.[5] The edict is now drawn in the ordinary form of initial writ. The next-of-kin are named individually and cited in the usual manner, the "others having interest" being cited edictally.[6] The action is raised in the Sheriff Court within whose jurisdiction the minor resides. If all the next-of-kin are furth of Scotland, the application must be made to the Court of Session.[7] The writ proceeds upon the ordinary induciæ.[8] On the summons being tabled in Court, the minor may appear and make choice of one or more parties to be his curators, whose appointment he may make simple or joint, with a *sine quo non* of a quorum, conditionally or unconditionally. The minor may also

[1] Act of 1880, s. 4 (5).
[2] *Ibid.*, s. 4 (10).
[3] Distribution of Business Act, 1857, s. 6: The rights of appeal are not affected by ss. 7 and 28 of the Act of 1907.
[4] Penney *v.* Scott, 1894, 22 R. 5.
[5] Act, 1555, c. 35; Wallace *v.* Kennedy, 1674, M. 16290.
[6] *Ibid.*
[7] *See* Buchan, 1873, 11 M. 662.
[8] Act, Rule 5.

make his nomination by probative deed, and in this case he does not require to appear personally. The curators next accept the office (in writing) and take the oath *de fideli*. If they be not present a commission may be appointed to take their acceptance and oath. Usually the next-of-kin do not appear, but when they do appear, the proceedings are the same.

**Curatorial Inventories.**—The next step is for the curator to give up an inventory of all the property of the minor. If the next-of-kin have appeared, they appoint a delegate to concur with the curator in making up the inventory, and when they do not appear the Court appoints a delegate to concur with them. On the inventory being made up, three copies are prepared and lodged by the curator. One copy is set aside for the next-of-kin on the father's and mother's sides respectively, and the third is given back to the curator.

**Act of Curatory.**—When these things are completed and caution has been found, the act of curatory is extracted and the curator is then fully installed in the office. The curator thus appointed acts both in lawsuits and in ordinary business. Where there are no such curators, the Court will always appoint a curator *ad litem* to act in any particular action which is depending.

**Tutorial Inventories.**—Although tutors cannot be appointed in the Sheriff Court, tutors nominate may give up the tutorial inventories in it in a manner similar to that used by curators. When the inventories are prepared and have been signed by the two nearest-of-kin on each side, they are, along with an application to the Sheriff, presented for authority to record. When the next-of-kin have refused to concur, the writ is served on them, and calls on them to see the Sheriff name delegates to sign for them: and unless cause is shown to the contrary, the Sheriff exercises that power.

**Guardians to Infants.**—By the Guardianship of Infants Act of 1886, the inconvenience formerly experienced of the Sheriff being unable to appoint tutors, has to a large extent disappeared. On the death of the father, the surviving mother becomes by that Act tutor to the pupil children, either solely or conjointly with any tutor whom the father may have named. It is not, consequently, competent to appoint the mother factor *loco tutoris* to her pupil children, as she is their tutor already by operation of Statute.[1] A mother

[1] Willeson, 1890, 28 S.L.R. 186.

cannot appoint guardians to her illegitimate children[1]: where the father has named no tutor, or the one named by him does not act, the Sheriff may name one to act along with the mother. On the death of the mother, leaving the father surviving, a tutor nominated by her, if the Sheriff thinks the father unfitted to be sole guardian, may be authorised to act along with him. On the death of both parents, if tutors have been appointed by each, they act jointly. Where tutors are unable to agree upon a question affecting the welfare of a pupil, any one of them may apply to the Sheriff for direction. The application is made in the usual form of writ; and may be made by any one interested. An appeal lies to either Division of the Court of Session from any order made by the Sheriff,[2] and the Sheriff may on cause shown or *ex proprio motu* remit the application to the Court of Session at any stage.[3]

[1] Brand *v.* Shaw, 1888, 16 R. 315.

[2] This right of appeal conferred by the Act of 1886 is not affected by the Act of 1907; Act, ss. 7, 28.

[3] Act, s. 5.

# CHAPTER XXXIV

## MISCELLANEOUS ACTIONS

### I. Maritime Cases


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**Jurisdiction.**—The jurisdiction and powers of the ancient Court of Admiralty in Scotland (instituted by the Act, 1609, c. 15, ratified by that of 1681, c. 16, and 5 Anne, c. 7, sec. 19, and regulated by 1 & 2 Geo. IV. c. 39), was finally abolished by 1 Will. IV. c. 69, by which its civil jurisdiction was transferred to the Court of Session, except in cases not exceeding £25 in value, which were made competent in the first instance in the Sheriff Court. In civil matters the Judge-Admiral, whose jurisdiction was thus transferred, was the Judge in the first instance in all maritime cases, such as questions on charter-parties, freights, salvages, wrecks, bottomries, policies of insurance, and all those relating to the lading and unlading of ships, or to any act to be performed within the bounds of his jurisdiction. He had jurisdiction also in all actions for recovery of goods, or their value, when the goods had been sent by sea from one port to another; and even in other mercantile matters, in no degree maritime, such as those involving questions relating to bills of exchange, he appears to have acquired prescriptively a right of cognisance. Section 4 of the Act of 1907 provides that the jurisdiction of the Sheriffs, within their respective sheriffdoms, shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms, and that where sheriffdoms are separated by a river, firth, or estuary, the Sheriffs on either side shall have concurrent jurisdiction over the intervening space occupied by water. It further provides that the powers and

jurisdiction formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the Sheriffs, provided the defender shall, upon any legal ground of jurisdiction,[1] be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised. In causes not exceeding £50, the jurisdiction of the Sheriff is, of course, privative. Maritime causes are not distinguishable from ordinary causes as regards procedure.

**Summary Recovery of Seamen's Wages.**—Under the Merchant Shipping Act of 1854, any seaman or apprentice or person authorised by him, or the master of a vessel, may sue in a summary manner for any wages due to him not exceeding £50. Such actions are therefore tried summarily in the manner provided in section 50 of the Act of 1907. The decree may be enforced by arrestment and poinding like any other decree. The use of this method of recovering wages in preference to the ordinary mode of recovering them, appears to be optional. Actions under the prescribed pecuniary limit are, however, competent in the Court of Session if (1) the owner is adjudged bankrupt or declared insolvent; (2) the ship is under arrest or is sold by authority of the Court of Session; (3) the Sheriff, under the provisions of the Act, refer it to that Court; and (4) neither owner or master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.[2]

**Recovery of Salvage.**—The Merchant Shipping Acts also prescribe the mode of recovering salvage where the amount claimed does not exceed £200, or where the value of the property saved does not exceed £1000. The Act of 1854 made it necessary to refer such a dispute to the arbitration of two Justices, but the amending Act of 1862 gives the claimant the option of referring it to the arbitration of the Sheriff.[3] If the sum in dispute exceeds £50, there is an appeal from the Sheriff's decision to the Court of Session, but otherwise the Sheriff's decision is final.[4] The

[1] *i.e.* by arrestment *jurisdictionis fundandæ causa*, which see, *ante*.

[2] Act of 1854, s. 189, as extended by the Act of 1862, s. 49.

[3] s. 49 (6, 7, 8).

[4] Act of 1854, s. 464.

action is tried summarily, but the proceedings are subject to certain special regulations. The claim may begin with a reference instead of the ordinary writ. In the case of a wreck, it must be brought before the Sheriff resident at or near the place where it is found; in the case of services connected with a ship, before the Sheriff at or near the place where she is lying, or the first port to which she is taken. The Sheriff may call to his assistance any person conversant with maritime affairs as assessor, or may refer the claim to such person as umpire. The Sheriff must determine the dispute within forty-eight hours after it has been referred to him, which must mean (if a writ has been requisite) after the respondent has appeared on the expiry of the induciæ. If the matter be referred to an umpire, he has forty-eight hours from his appointment in which to determine the dispute. Provision is made in the leading Act for the umpire's remuneration, for calling for the production of documents and administering oaths. It also contains provisions for enforcing the award where the receiver's assistance is requisite, and also for apportioning it. In cases where an appeal is competent, the evidence should be recorded.[1] In such cases the Sheriff is bound, on the request of either party, to record the evidence in the usual way; and if in consequence of the want of such request the evidence has not been recorded, the Court of Session will refuse to entertain the appeal. The proceedings in the case of an appeal are not well defined. The party must give notice of his intention within ten days, and take his appeal within twenty. When this is done a certified copy of the proceedings must be transmitted, along with a certificate by the Sheriff, of the gross value of the article respecting which salvage is claimed. If the claim exceeds £200 and the value saved exceeds £1000, it must be taken to the Court of Session, unless the parties consent to its being tried in the Sheriff Court. If, however, the sum awarded in the Court of Session is less than £200, the claimant is not awarded costs unless the Court certify the case as one fit for trial in the Supreme Court.

**Sett and Sale of Ships.**—Where the owners of a ship disagree as to the manner in which it is to be employed, and are unable to arrange their dispute, or when one desires to sell his share to

[1] Sinclair *v.* Spence, 1883, 10 R. 1077.

the other owners or to buy them out, and is unable to effect his purpose, an action of sett and sale is competent in the Sheriff Court. The action proceeds in the ordinary form at the instance of the owner who desires to be free from the other owners, the crave being that the defenders may be decreed either to take pursuer's share at a certain price or to let him have their shares at a corresponding rate; or, failing such an agreement, that the vessel may be sold by public roup and the price divided among the several owners according to their respective shares. If, when on the expiry of the induciæ, the action comes into Court, no defences to the competency are stated, either of the parties agrees by minute to take the shares of the other at the price put upon them, an interlocutor is pronounced decerning and adjudging accordingly. If, on the other hand, no such agreement is come to, and the defenders will neither accept the pursuer's offer to sell his shares nor agree to sell theirs to him, the ship is ordered to be sold and the price divided, the sale taking place in the same way as in the case of an arrested vessel.[1]

## II. Recovery of Rates and Assessments and of Taxes

**Rates and Assessments.** — Provisions in various Statutes authorise proceedings for the recovery, by summary procedure, of rates and assessments due to authorities other than the Crown. These Statutes usually provide that upon a certificate by the collector that the rates and assessments are due and unpaid, the Sheriff shall issue a warrant for their recovery. When this course is taken it was formerly regarded as excluding all discussion of the merits in the Sheriff Court, since there is at common law no power in that Court to use the remedy of suspending a charge, and the statutory powers of suspension conferred by the Act of 1838 were not applicable.[2] Now, however, since under the provisions of the Act of 1907, suspensions of charges or threatened charges of decrees pronounced in the Sheriff Court are competent, the Sheriff appears to possess the power indirectly, as he may directly, where the local authority proceeds by way of ordinary or Small Debt action to recover the amount,[3] to decide whether the rate

[1] *See ante.*

[2] *See* Suspension, *ante.*

[3] M'Tavish *v.* Cal. Canal Comrs., 1876, 3 R. 412.

or assessment imposed is legal.[1] The chief peculiarity about the proceedings for recovery of rates and assessments is, that whether taken under the special Statute or at common law, imprisonment is still competent. The Debtors' Act of 1880, which abolished imprisonment for civil debt, exempted from its operation "rates and assessments lawfully imposed or to be imposed"; and as the limit of £8, 6s. 8d., below which the remedy was incompetent for other civil debts, never applied to them, it may be used, however small their amount may be.[2] The proceedings for imprisoning are the same as those already explained in connection with decrees *ad factum præstandum*. The amount remaining due at the date of imprisonment must be entered in the prison books,[3] and on payment, or consignation of it with a magistrate where there is no one to receive payment, the debtor must be liberated.[4] He is entitled to aliment under the Act of Grace,[5] and he can in no case be kept in prison longer than six weeks for the rates and assessments of any one year.[6]

**Taxes** due to the Crown are for the most part recovered by summary warrant issued upon the certificate of the collector in the same manner as those with reference to rates and assessments, though they may also be recovered by ordinary action. Imprisonment is still competent under the decree, but its period must not exceed twelve months.[7] The Crown seldom makes use of the power of imprisonment; when it does, the special Statute under which the tax is due must be consulted for the mode of using the remedy.

[1] There may possibly be some dubiety as to whether a warrant issued by the Sheriff for the recovery of rates and assessments is a decree of Court in the sense contemplated by the Act. Whether it be actually or constructively a "decree" or not, it seems undoubted that it at any rate has all the effect of one.

[2] 5 & 6 Will. IV. c. 70.

[3] Garden *v.* M'Coll, 1826, 5 S. 123.

[4] Forbes *v.* Alison, 1823, 2 S. (*o. e.*) 169.

[5] *Supra*, p. 438.

[6] Civil Imprisonment Act, 1882, s. 5.

[7] Debtors' Act, 1880, s. 4.

## III. Proceedings connected with Ecclesiastical Buildings and Glebes


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**Ecclesiastical Buildings and Glebes Act, 1868.**—By this Act certain proceedings which formerly were commenced and concluded in the Presbyteries of the Established Church of Scotland, may be removed from those tribunals to the Sheriff Court at any time that any of the interested parties becomes dissatisfied with their determination. The proceedings in question are those relating to the building, rebuilding, repairing, adding to, or making other alterations on churches or manses, or to the designing or excambing of sites for these buildings, or of glebes, or of additions to glebes, or of sites for churchyards, or additions to churchyards, and proceedings relating to the suitable maintenance of all such subjects, specially including the building or repairing of churchyard walls.[1]

**How Proceedings removed from the Presbytery.** — The proceedings are begun before the Presbytery in the manner in use prior to the Act, but upon any order, finding, judgment, interlocutor, or decree being pronounced by the Presbytery with which the minister of the parish or any heritor is dissatisfied, he may appeal the whole cause within twenty days from the date of the deliverance.[2] If the appeal be not taken within the proper time, the proceedings are final, unless, indeed, the Presbytery have been guilty of "a serious violation of the ordinary rules" for the administration of justice, "whereby iniquity or injustice has resulted."[3] The appeal is taken by presenting a summary application (which may be in the ordinary form) to the Sheriff of the county in which the parish is situated, praying him to stay the proceedings before the Presbytery, and to dispose of the same himself. If the parish is in more than one county, the petition may be presented to and disposed of by the

[1] 31 & 32 Vict. c. 96. Even though the order complained of be pronounced by the Presbytery incidentally in an incompetent proceeding, an appeal under this Act is the appropriate means of seeking redress; Heritors of Pitsligo *v.* Gregor, 1879, 6 R. 1063.

[2] Act, s. 3.

[3] Walker *v.* Arbroath Presbytery, 1876, 3 R. 498.

Sheriff of either.[1] The petition is intimated, within ten days of presentation, to the heritors and their clerk, to the ministers of the parish, and to the clerk of the Presbytery, by circular, in the manner provided for in the Statute.[2] This intimation is made by the petitioner's agent without any special order; but the Sheriff must satisfy himself that it has been duly made, and if he discover any defect he must cause it to be remedied.[3] Where the appeal is duly made and insisted in,[4] it has the effect of staying any further progress before the Presbytery, and the proceedings must be concluded before the Sheriff Court; or (under appeal from it) by the Lord Ordinary. On the appeal being intimated, the Presbytery clerk will have to transmit to the Sheriff-Clerk the previous proceedings, in the same way as any other Court would have to do on an appeal being taken from it. The appellant must produce certified copies of the references to the proceedings contained in minute-books or other books belonging to the Presbytery.

**Conduct of Proceedings in Sheriff Court.**—The Sheriff's first duty in the petition is to inquire into the circumstances and hear the parties or their agents. This he must do without written pleadings, unless he sees fit specially to order them. He takes a note of the proceedings and of any evidence which may be led before him, and then disposes of the petition as shall be just.[5] In addition to the general regulations, of which the substance has here been given, the Act contains special regulations as to how the inquiry is to be made in each of the several kinds of proceedings with which the Act deals, but these it would be needless to repeat here. The Sheriff may dispose of all questions of expenses.[6]

**Appeal from the Sheriff.**—All deliverances by the Sheriff are final and conclusive, and not subject to review, unless appeal be taken to the Lord Ordinary on Teinds. As there is no appeal except that given by the Statute, there is none to the Inner House of the Court of Session,[7] and upon the same principle there is no

[1] Act, s. 4.

[2] Act, s. 5. If the heritors exceed forty, notice on the church door and advertisement may be substituted for the circulars to them.

[3] Act, s. 6.

[4] If the original appellant do not insist in the appeal, the minister or any heritor, or the heritor's clerk or the Presbytery clerk, may insist in it. Act, s. 3.

[5] Act, ss. 7, 8.

[6] Act, s. 15.

[7] Heritors of Pitsligo *v.* Gregor, 18th June 1879, 6 R. 1062. For excess of jurisdiction the Court of Session might quash; Magistrates *v.* Presbytery of Arbroath, 13th March 1883, 10 R. 767.

appeal from the Sheriff-Substitute to the Sheriff. The statutory appeal from the Sheriff to the Lord Ordinary may be written on the end or margin of the deliverance, or be contained in separate note, duly signed by the appellant or his agent, and dated.[1] It must be taken within twenty days of the date of the deliverance[2]; and the Sheriff-Clerk must, within two days of the appeal being taken, give notice to the respondent, and transmit the process to the Depute-Clerk of Session.[3] The effect of an appeal is to transfer the whole cause to the Lord Ordinary, and to give him the full powers which the Sheriff could have exercised, in so far as these are not limited by deliverances which have become final. Counter appeals are unnecessary, and any party interested may insist in an appeal if the original appellant withdraw.[4] The appeal appears to have the effect of removing the action entirely to the Lord Ordinary, and of requiring the proceedings to be carried on before him to their termination.[5]

### IV. Registration of Irregular Marriages

Persons who have contracted an irregular marriage may, within three months thereafter, present a joint application to the Sheriff of the county in which the marriage was contracted for a warrant to register such marriage. Such a warrant is granted by the Sheriff on proof of the marriage, and on proof that one of the parties usually resided in Scotland at the time of the marriage, or had lived there for twenty-one days preceding the marriage.[6] Usually a declaration in writing by the parties that they are husband and wife, signed before two witnesses, is appended to the application for warrant to register the marriage. The parties, attended by the witnesses, then appear before the Sheriff, and after their depositions have been taken, warrant as craved is granted. A certified copy of the entry in the register is evidence of the marriage.[6]

[1] Act, s. 16.
[2] Act, s. 17. During this time extract is incompetent.
[3] Act, s. 19.
[4] Act, ss. 18, 20.
[5] *See* Dove Wilson, pp. 403–7.
[6] 19 & 20 Vict. c. 96, ss. 2, 3.

# PART V

## APPEALS AND EXPENSES

# CHAPTER XXXV

## APPEALS

### Appeals from Sheriff-Substitute to Sheriff


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**Introductory.**—The right of appeal from Sheriff-Substitute to Sheriff did not exist at common law, the Sheriff-Substitute being in fact as well as in name the deputy of the Sheriff. His decisions therefore derived their authority from the fact that in law they were the decisions of the Sheriff himself, delivered through the medium of his Substitute. The right of appeal to the Sheriff, which was the product of a process of evolution, owed its origin to the practice, at first tentative, but subsequently universal, of petitioning the Sheriff to reconsider his judgment. As the Sheriff was not originally, as he subsequently became, and with two exceptions is now, non-resident in the county of his jurisdiction, such reclaiming petitions were disposed of by him personally at the time of the application. After the practice of residing outwith his jurisdiction became practically universal, in order to obviate the inconvenience and delay necessarily involved in an appeal to the Sheriff to reconsider his judgment, the Sheriff-Substitute was frequently invited, before deciding a case, to obtain the opinion of the Sheriff, a request with which, as he held office at the Sheriff's pleasure, he not unnaturally complied. The dispensing with the intervention of the Sheriff-Substitute as a step in the obtaining of the Sheriff's opinion on his Substitute's judgment, gradually became an established practice, the Sheriff-Substitute issuing an interlocutor

in which leave to appeal against his judgment was allowed. The last stage, prior to the introduction of the modern forms, was the system embodied in the Act of Sederunt of 1825, and continued by that of 1839, under which a general right of appeal in all cases, except those in which the Sheriff-Substitute was of opinion that his interlocutor ought to be carried into immediate effect, was substituted for the limited right of appeal in cases in which leave to appeal might be obtained from the Sheriff-Substitute. Prior, therefore, to the Act of 1853, and under the system introduced by the Acts of Sederunt mentioned, there was an unlimited right of appeal from the judgment of the Sheriff-Substitute, whether interlocutory or final, in all cases in which parties considered themselves aggrieved. But the Act of 1853 materially curtailed this power and made it incompetent to appeal any judgment, other than one in which the merits of the cause, either in whole or in part, were finally disposed of, which did not dispose of a dilatory defence, sist process, allow a proof, or decide upon the admissibility of evidence. So matters stood until the passing of the Act of 1876, which not only defined the judgments against which appeal to the Sheriff might be taken, but specifically declared that none but those enumerated should be competent. The provisions of that Act are substantially the same as those contained in the Act of 1907. There is, however, this important difference to be noted, that while the Act of 1907 declares that appeal shall be competent against all final interlocutors, and also against the interlocutors enumerated, it does not in terms enact that appeal shall not be competent against interlocutors other than those enumerated. The effect of the absence of this provision appears to be, since the Act repeals all former Acts dealing with the Sheriff Court, to leave the determination of the question of the appellability of interlocutors other than those specified to the rules of the common law. As, however, at common law, and apart from statutory enactment, no right of appeal from Sheriff-Substitute to Sheriff is recognised, the effect of the absence of any statutory limitation would appear to be immaterial, and as the right of appeal can be such only as is expressly conferred by Statute, there would consequently appear to be no appeal from the Sheriff-Substitute to the Sheriff in the case of judgments other than those in which such right is specifically conferred.

**Appeals Competent.**[1]—Judgments are divided into two classes, final and interlocutory.

*Final Interlocutors.*—All final judgments of the Sheriff-Substitute are appealable to the Sheriff.[2] A final judgment is an interlocutor which by itself or taken along with previous interlocutors disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for.[3] As the allowance of appeal under this head is the same as regards appeal from the Sheriff to the Court of Session, consideration of the subject is reserved for the chapter dealing with such appeals.

*Interlocutory Judgments.*—Appeal is competent against all interlocutors.

(a) *Granting or refusing Interdict, interim or final.*[4]—An interim interdict, though appealed, is operative till recalled.[5]

(b) *Granting interim Decree for the Payment of Money, other than a Decree for Expenses.*[6]—An interim decree for the payment of a consigned fund to a person other than the consigner is appealable, in respect that it is a decree for the payment of money.[7]

(c) *Making an Order* ad factum præstandum.—An interlocutor ordering the interim consignation of money, though not a decree for the interim payment of money,[8] is an order *ad factum præstandum*,[9] and is therefore appealable without leave. So an order to consign anything falls under the category of orders *ad factum præstandum.*

(d) *Sisting an Action.*

(e) *Allowing or refusing, or limiting the Mode of Proof.*—It is only the interlocutor which allows, refuses, or limits the mode of proof, which is appealable without leave, and when an interlocutor allowing

[1] The subject of appeals in summary causes has been dealt with in the chapter dealing with such causes; only appeals in "ordinary" causes are dealt with in this chapter.

[2] Act, s. 27.

[3] Act, s. 3 (h); Court of Session Act, 1868, s. 53; Act, 1876, s. 3.

[4] The subject is dealt with in the chapter relating to Actions of Interdict.

[5] Act, s. 29.

[6] *See* Notman *v.* Kidd, 1872, 9 S.L.R. 292. The Act of 1876 did not contain the limiting words.

[7] Baird *v.* Glendinning, 1874, 2 R. 25; Sinclair *v.* Baikie, 1884, 11 R. 413.

[8] Maxton *v.* Bone, 1886, 13 R. 912.

[9] *See* M'Lintock *v.* Prinzen, 1902, 4 F. 948.

proof has been pronounced and is not appealed against, a subsequent interlocutor merely fixing a diet, assigning a new diet,[1] adjourning or refusing to adjourn the diet, is not subject to appeal. But an interlocutor fixing a diet for jury trial is expressly excepted by the Statute. If, however, the former allowance of proof has lapsed, with the result that an allowance of proof of new becomes necessary, such subsequent interlocutor is subject to appeal.[2] Interlocutors refusing a proof are seldom pronounced in so many words, but an interlocutor which by necessary inference does so, as one sustaining a plea to the relevancy of a fact not admitted, would appear to be appealable. Interlocutors limiting the mode of proof are those where a proof at large or *prout de jure* is refused and one by writ or oath is granted. Although the granting or refusal to grant a diligence for the recovery of writings before the record is closed may in a sense be said to virtually amount to the grant or refusal of the proof which the documents are expected to establish, it has been decided that such an interlocutor is not one allowing or refusing proof, and it therefore cannot be appealed against without leave.[3] And an interlocutor deciding upon the question of the admissibility of evidence, including that of documents, is not appealable without leave.[4] An interlocutor *fixing a diet* for jury trial is not appealable without leave. In the class of actions contemplated by section 31 of the Act, either party may demand, so soon as a proof has been allowed, that the action shall be tried by jury. Before trial by jury, therefore, in such cases can be demanded, a proof must have been allowed. The right to require the cause to be tried by jury subsists for six days after issue of the interlocutor allowing proof. But as the Sheriff has no discretion to refuse a jury trial, there is no interlocutor, other than the interlocutor allowing proof, and that fixing the diet for the trial of the cause by jury. The former is appealable, but the latter is not, for the simple reason that if the allowance of proof is itself not appealed, neither party can object to the other's request for a trial by jury. But the section contemplates that the demand for jury trial may be made the moment proof is allowed. Therefore to preserve the right of the party who may wish to appeal against the interlocutor allowing proof, that

[1] Murphy *v.* M'Keand, 1866, 4 M. 444.

[2] Kinnes *v.* Fleming, 1881, 8 R. 386.

[3] Stewart *v.* Kennedy, 1890, 17 R. 755.

[4] *See infra.*

interlocutor should not contain an order fixing a diet for jury trial, which should be reserved for a subsequent interlocutor, even though the fixing of the diet should be made simultaneously with the order allowing proof.

(f) *Against which the Sheriff-Substitute, either* ex proprio motu *or on the Motion of any Party, grants leave to Appeal.*—Any interlocutory judgment may be appealed against with leave of the Sheriff-Substitute. The statutory rules specifically provide that certain interlocutors may be appealed against with leave, from which it must be assumed that in any event such interlocutors are not appealable without leave. These are interlocutors (*a*) remitting a cause to another Sheriffdom, either upon the ground of "sufficient cause" or that the plea of no jurisdiction has been sustained[1]; (*b*) rejecting or sustaining objections to the admissibility of evidence in the course of a proof[2]; and (*c*) deciding the question of the confidentiality with reference to documentary or oral evidence, or of objections made to the production of documents on pleas of alleged hypothec or otherwise, in the course of a proof.[3] Leave to appeal against an interlocutor may be granted either upon motion or minute, and the application must of course be made to the Sheriff-Substitute who pronounced the interlocutor which it is desired to appeal against.

**Form of Appeal.**—An appeal is taken by the appellant or his agent dating and signing a note on the interlocutor sheet in the following terms: "The pursuer (or defender, or other party) appeals to the Sheriff."[4] If the interlocutor sheet is not in the Sheriff-Clerk's hands, the note may be written on a separate paper and lodged with the Sheriff-Clerk, along with a certificate by him that the interlocutor sheet is not in his hands.[4] A party who desires to appeal against only a part of the Sheriff-Substitute's interlocutor must lodge his note of appeal in the unqualified terms prescribed by the Statute. A qualified appeal would appear to be incompetent in point of form, and in any event such an appeal even if competent, could not in any way limit the powers of the Sheriff in dealing with the question in controversy submitted thereby to his review.

**Time for Appeal.**—A final judgment of the Sheriff-Substitute

[1] Act, Rules 20 and 21.
[2] Act, Rule 75.
[3] Act, Rule 76.
[4] Act, Rule 87.

may (if appeal be competent, and unless otherwise provided) be appealed against to the Sheriff at any time within three months of its date, but not later, if it has not been sooner extracted or implemented.[1] Any other appealable interlocutor of the Sheriff-Substitute, with the exception of those specially enumerated as appealable with leave, may be appealed within fourteen days, but not later, if not sooner extracted.[1] An appeal against an interlocutor deciding the question of confidentiality with reference to oral or documentary evidence, or of objections to the production of documents, etc., must be taken at the time and in open Court.[2] An interlocutor transferring the cause to another sheriffdom must be appealed within seven days from the date of the interlocutor[3]; and a decision upon objections to the admissibility of evidence taken during the course of a proof, must be appealed within seven days from the close of the proof, if in the interval the Sheriff-Substitute has not pronounced judgment.[4] If in the latter case judgment has been pronounced, the appeal will be against a final judgment. The date of every interlocutor is deemed to be the date not on which it is signed, but on which it is entered in the Books of Court.[5] Where an interlocutor therefore is transmitted to the Sheriff-Clerk to be entered in the Books of Court, the date should be left blank so that it may be filled up by the Sheriff-Clerk when he enters it; or if the interlocutor bear to be signed on a date anterior to that of its being entered in the Books of Court, a note of the date of entry should be added by the Sheriff-Clerk. The Statute, however, makes no provision on the subject. All interlocutors (save in summary causes) are extractable after the lapse of fourteen days, or at such earlier date as the Sheriff may allow extract. In the case, therefore, of a final, as in the case of an interlocutory judgment, the party who desires to appeal can never rely on having more than fourteen days within which to lodge his appeal. When leave to appeal is necessary, either in the case of an interlocutory judgment, which is not specifically included in the category of such judgments appealable without leave, or in the case of the three classes of interlocutor which are specifically described as appealable with leave, care must be taken to ensure that application for leave is made sufficiently early to enable the appeal

[1] Act, Rule 86.
[2] Act, Rule 76.
[3] Act, Rules 20 and 21.
[4] Act, Rule 75.
[5] Act, Rule 83.

to be lodged within the statutory time, since the Sheriff possesses no power to extend the time within which an interlocutory appeal is competent.[1]

**Procedure in Appeal.**—On an appeal being taken, the Sheriff-Clerk must within two days transmit the process to the Sheriff, and also send written notice of the appeal to the other parties or their agents, though failure to give such notice does not invalidate the appeal.[2] The appeal may be disposed of, in the option of the Sheriff, (*a*) by a reclaiming note and answers; (*b*) by hearing parties orally at a diet fixed by him; or (*c*) where the parties concur, without either a reclaiming note or a hearing,[3] the concurrence of the parties being presumably intimated by a written note lodged along with or immediately after the appeal and transmitted by the Sheriff-Clerk. It is not competent for the Sheriff to order a reclaiming note and to hear parties as well. If a reclaiming note and answers are ordered, the Sheriff prescribes the time within which they must respectively be lodged, but he may upon cause shown prorogate the time for lodging them or either of them.[4] If an oral hearing be ordered, he fixes the diet. In either case, if the order to lodge the reclaiming note and answers, or either of them, be not implemented within the time specified, or if either party fails to appear by himself or his agent at the diet of hearing, the Sheriff may grant decree as craved, or of absolvitor, or dismiss the action, with expenses. If at the diet all parties fail to appear, he must dismiss the action.[4] The reclaiming note and answers should be in the form of written arguments for the parties respectively, and should not, except where absolutely indispensable, contain quotations from the interlocutors, notes, or pleadings.[5]

**Effect of Appeal.**—In order that the Sheriff may do complete justice without hindrance from the terms of any interlocutor in the cause,[6] an appeal has the effect of submitting to review the whole of the interlocutors pronounced in the cause, and is available to and may be insisted in by all other parties to the cause, notwithstanding they may not have noted separate appeals.[7] The phraseology of the

[1] Duff *v.* Stewart, 1881, 9 R. 17.

[2] Act, Rule 88.

[3] Act, Rules 89, 90.

[4] Act, Rule 56. For the discussion of the question whether he can "prorogate" the time for lodging after the period has elapsed, *see ante*, Decree by Default, p. 318 *et seq.*

[5] Act of 1876, s. 30, not repeated in the Act of 1907.

[6] Act of 1876, s. 29.

[7] Act, s. 29.

section is sufficiently wide to cover prior interlocutors which could not have been appealed against at the time. An appeal on the question of the import of the proof opens up the question whether the proof was properly allowed. Counter appeals are unnecessary, since any party may insist in an appeal lodged by any other party. Thus, where one party appeals against a decree awarding damages, the Sheriff may, at the instance of the opposite party, increase them. To prevent the rule from being defeated after an appeal has been noted, the appellant is not entitled to abandon it, unless of consent of all parties, or by leave of the appellate Court.[1] The Act of 1876 provided that it should be competent for the Sheriff on appeal, *ex proprio motu*, to open up the record if it appeared to him not to have been properly made up, or to allow further proof. That provision is not incorporated in the Act of 1907, but section 79 (in which the word "Sheriff" covers both Sheriff-Substitute and Sheriff) provides that upon the motion of either party the Sheriff may, at any stage of the cause, and upon such expenses as to re-service or otherwise as he shall deem proper, allow the record to be altered or amended to the effect of enabling him to determine the real question in controversy (including amendment of the instance and the initial writ and the adding of parties), notwithstanding that the conclusions of the action may be thereby enlarged or altered. The record may therefore be altered or amended on the motion of either party, but not apparently *ex proprio motu* of the Sheriff. The granting of additional proof was formerly in the discretion of the Sheriff, and in the case of the Sheriff-Substitute required to be supported by "very weighty reasons"[2] before it could be granted. The Act of 1907 makes no provision for additional proof either in the case of the Sheriff-Substitute, or, on appeal, by the Sheriff. Where, therefore, such additional proof is necessary for the purpose of enabling the Sheriff to do complete justice and to decide the question in controversy between the parties, it can only, it would appear, be obtained by appeal to the Court of Session. No doubt, however, in every case where it appears to be necessary or expedient, it will be granted by the Court, subject to such conditions as it may impose.[3] At any time before extract, or before the transmission of the process in which an appeal to the Court of Session has been taken, the Sheriff

[1] Act, Rule 96; King *v.* Gavan, 1880, 17 S.L.R. 583.

[2] A. S. 1839, s. 83.

[3] *See* p. 188.

may correct any clerical or incidental error in his judgment.[1] Notwithstanding the death, resignation, or removal of a Sheriff, appeals may be taken from the judgment of a Sheriff-Substitute, which appeals are heard by the succeeding Sheriff when he enters upon office.[2]

**Regulating Possession pending Appeal.**—Notwithstanding the appeal, the Sheriff-Substitute has power to regulate all matters relating to interim possession, to make any order for the preservation of any property to which the action relates, or for its sale if perishable, or for the preservation of evidence, or to make in his discretion any interim order which a due regard to the interests of the parties may require.[3] Such orders are not subject to review except by the appellate Court at the hearing of the appeal.[3] The appeal does not prevent the immediate execution of a warrant of sequestration for rent, or of warrants to take inventories, or place effects in custody *ad interim*, or warrants for interim preservation.[3] An interim interdict is binding till recalled.[4]

**Expenses of Appeal.**—The expenses of the appeal are within the discretion of the appellate Sheriff, the practice being to award them to the successful party as expenses in the cause. The expenses must however be specifically dealt with by the Sheriff, and a simple affirmature of an interlocutor giving expenses is insufficient to carry the expenses of the appeal.[5]

[1] Act, Rule 84.
[2] Act, s. 27. *See also* p. 616.
[3] Act, Rule 91.
[4] Act, s. 29.
[5] Macdonald *v.* M'Eachan, 1880, 7 R. 574.

# CHAPTER XXXVI

## APPEALS FROM SHERIFF COURT TO COURT OF SESSION


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**Introductory.**—It is a general principle of our common law that every judgment of an inferior Court, whether final or interlocutory, is subject to the review of the Court of Session, unless, either expressly or by necessary implication from its terms, an Act of Parliament has declared otherwise. Historically, and according to the theory of the common law, every judgment pronounced in the Sheriff Court, whether by the Sheriff-Substitute or by the Sheriff, is a decision by the latter. When in the process of evolution the decision of the Sheriff-Substitute became recognised as a judgment independent of but appealable to the Sheriff, his decision, as a decision pronounced in an inferior Court, remained appealable to the Court of Session. The position of the Sheriff became that of an intermediary appellate Judge, to whose decision an unsatisfied litigant might or might not in the first instance resort at his option, but to whose decision he was not, before presenting an appeal to the Supreme Court, in any way bound to submit his case. But until even comparatively recent times the decisions of the Supreme Court leant more or less strongly to the view that, while theoretically a litigant was not so bound, there was some impropriety in his submitting his case to the decision of the Supreme Tribunal before he had obtained the opinion of the Sheriff upon the judgment of the Sheriff-Substitute. In more recent times, however, all such expressions of opinion have been discountenanced, and the right of a litigant to appeal from the judgment of the Sheriff-Substitute direct to the Court of Session has become firmly established. The position of the Sheriff as an intermediate Judge of Appeal has become definitely determined, and, so far as regards appeal to the Court of Session, the decisions of the Sheriff-Substitute and of the Sheriff, if not of equal value, are of co-ordinate authority.

Parliament has, however, seen fit, by various Statutes passed at different times, to limit the right of appeal thus competent at common law. In order that the time of the Supreme Court should

not be wasted in considering questions involving a more or less trifling amount, Statutes have at various times been passed conferring a privative jurisdiction upon the Sheriff in cases involving questions below a certain pecuniary limit of value. In such cases, and in the kinds of judgment appropriate to review, a right of appeal to the Sheriff has generally been conserved, but all review of the judgment of the Sheriff Court has been excluded from the purview of the Court of Session. Up till the passing of the Act of 1907 that limit stood at £25 in actions instituted in the Ordinary Court. As will be seen, under the provisions of the Act of 1907 the limit has now been raised to £50. And in a certain class of cases, known as Summary Causes, in which the value of the cause exceeds £20 but does not exceed £50, there is only a limited right of appeal from Sheriff-Substitute to Sheriff, and a still further limitation of appeal from Sheriff to Court of Session. In that class of cases there has been introduced the further peculiarity that appeal from the Sheriff-Substitute to the Court of Session direct is incompetent.

Numerous Statutes now exist which impose new duties and confer extended jurisdiction on the Sheriff, and such Acts usually contain specific provisions as to the right of appeal from the Sheriff-Substitute or the Sheriff to the Court of Session. The Act of 1907 provides that nothing contained in it shall affect any right of appeal, or any exclusion or allowance of appeal, competent under any Act of Parliament in force at the date of its passing. To ascertain, therefore, whether under any Act of Parliament the common law right of appeal from the decision of the Sheriff to the Court of Session is excluded or restricted, the terms of the particular Act must be scrutinised.

The conduct of the parties may, however, be such as to deprive them of a right of appeal in cases in which such appeal is competent, either (*a*) expressly, as where they agree to accept the decision of the Sheriff as final,[1] or (*b*) by necessary implication, as where the parties consent to the terms of a judgment beforehand,[2] or where they take the case *extra cursum curiæ* and constitute the judge not a

[1] Shiels *v.* Shiels' Trs., 1874, 1 R. 502; Lindsay *v.* Walker's Trs., 1877, 4 R. 870.

[2] Whyte *v.* Whyte, 1895, 23 R. 320; where one of the parties denies having given his consent, the cause will be remitted back to the Sheriff.

judicial functionary but a civil arbiter.[1] Mere informal deviations from ordinary procedure do not have the effect of withdrawing the case *extra cursum curiæ*. Thus, where a Sheriff had granted the prayer of a petition for recall of arrestments, no answers having been lodged, it was held that there had been no such departure from procedure as to constitute the Sheriff an arbiter and bar the appellant from appealing his decision.[2] And although parties may, by agreement, take a case *extra cursum curiæ* and constitute the Judge an arbiter of civil rights, they cannot, by minute or otherwise, appoint him an arbiter to pronounce a sentence of fine or imprisonment in cases, such as breach of interdict, where such sentence is competent.[3]

**Limitation of Value.**—The jurisdiction of the Sheriff Court is privative in all actions where the value of the cause does not exceed £50. Actions *ad factum præstandum*, in which the criterion of value is not applicable, are excluded from the operation of this rule unless the value of the cause is actually disclosed or is ascertained by the Sheriff, in either of which cases the appellability of the action depends upon the value so disclosed or ascertained. The Act of 1907 provides that, subject to its provisions and those of the Small Debt Acts, all causes not exceeding £50 in value, *exclusive of interest and expenses*, competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session.[4] In a subsequent section[5] this provision is substantially repeated with the omission of the words italicised. It cannot, however, be doubted that although the latter section deals specifically with the subject of appeals to the Court of Session, the omission of the words "exclusive of interest and expenses" has been occasioned either *per incuriam* or because, as the former section is that which deals in the widest terms with the privative jurisdiction of the Sheriff, their specific inclusion was deemed to be unnecessary, because necessarily implied. The one section may be said to regard the privative jurisdiction of the Sheriff in its negative, the other in its positive, aspect. The former enjoins that an action which does not exceed £50, exclusive of interest and

[1] Steel *v.* Steel, 1898, 25 R. 715; see Chap. II., Prorogating Jurisdiction.

[2] Gordon *v.* Bruce, 1897, 24 R. 844.

[3] Stark's Trs. *v.* Duncan, 1906, 8 F. 429, *per* Ld. Pres. Dunedin.

[4] Act, s. 7.

[5] Sec. 28.

expenses, must remain in the Sheriff Court, the latter that an action which does exceed that limit of value may be appealed to the Court of Session. But if an action which does not exceed £50, exclusive of interest and expenses, must remain in the Sheriff Court, then it seems clear that an action which exceeds that limit only by the inclusion of interest and expenses as part of its value, cannot competently be appealed. And it will be noticed that, under both sections, an action the value of which is exactly £50, must remain in the Sheriff Court, in respect that it does not exceed the statutory limit.

**Determination of Value by Sheriff.**—The Act of 1907 does not create but merely extends the limit of the Sheriff's privative jurisdiction. Under previous practice, however, in a cause where the actual value was not disclosed, there were no means, other than an appeal to the Court of Session, by which its value might be ascertained. In an action containing merely pecuniary conclusions where the sum sued for was under the statutory limit, no difficulty existed in determining that no right of appeal existed. Where, however, an action contained alternative conclusions, as for specific implement of an obligation or delivery of a specified article, or alternatively for payment of a sum of money, some difficulty was experienced in determining the actual value of the cause, on which, of course, the right of appeal from the Sheriff's judgment depended. The only way in which, in such cases, the right of appeal could be determined was by taking the appeal and obtaining the decision of the Court upon the question. Under the provisions of the Act of 1907, the determination of the value, if needful, rests with the Sheriff before whom the cause depends, for which purpose he is, in such way as he thinks expedient, to inquire into and determine its value for the purposes of the Act.[1] In actions *ad factum præstandum* the value of the cause is deemed to exceed £50 unless (*a*) its value is disclosed, or (*b*) the Sheriff determines in the course of the cause that its value is less.[2] Where the Sheriff determines the value of the cause his determination is final as regards the competency of the action on the ground of value, but not otherwise.[1] The meaning of these sections would appear to be as follows:—

1. In actions containing only pecuniary conclusions, the value of the cause is the sum sued for. In such actions, therefore, no deter-

[1] Act, s. 9. [2] Act, s. 7.

mination of the value of the cause by the Sheriff is necessary. If the action conclude for payment of a sum below £50, exclusive of interest and expenses, there is no appeal to the Court of Session.

2. In actions containing *only* conclusions *ad factum præstandum*, no determination of the value of the cause is either called for or necessary. It is not called for because in such actions the importance of the question in controversy is not measurable by purely pecuniary standards, and therefore the value of the cause, that is, its value to the parties respectively interested in the determination of the question in controversy between them, cannot be measured in terms of pounds, shillings, and pence. It is not necessary because, in the first place, actions containing only conclusions *ad factum præstandum* are expressly excluded from the category of summary causes, that is, of causes exceeding £20 and not exceeding £50 in value, exclusive of interest and expenses,[1] and such actions must necessarily therefore be deemed to exceed £50 in value; and, in the second place, because in such actions the ultimate sanction of the decree in which is the incarceration of the defender, appellate jurisdiction is equitably conceded. Thus under previous practice an action concluding for the delivery of an animal was held to be subject to review, although it appeared from the record that it had been sold at auction for a comparatively trifling sum.[2] Similarly, a right of appeal was held competent in an action for the delivery of certain documents of debt, irrespective of the actual pecuniary value of the documents themselves.[3] And in an action which concluded for sequestration, caution, and removing, appeal was held competent though the rent was under the limit.[4] Similarly, an application by a creditor to have a bankrupt ordained to execute a disposition *omnium bonorum* in a cessio was held to be an application for an order *ad factum præstandum* and to be therefore appealable, although the claim of the petitioning creditor was under the statutory limit.[5]

3. If the action contains *ad factum præstandum* conclusions, and alternatively or in addition conclusions for the payment of money,

[1] Act, s. 3 (i).

[2] Purves *v.* Brock, 1867, 5 M. 1003.

[3] Henry *v.* Morrison, 1881, 8 R. 692.

[4] Thomson *v.* Barclay, 1883, 10 R. 694; *cf.* Welsh *v.* Duncan, 1893, 20 R. 1014.

[5] Broatch *v.* Pattison, 1898, 1 F. 303.

then in so far as the value of the cause is not disclosed it becomes the duty of the Sheriff, if required, to determine that value for the purposes of the Act, one purpose being the decision of the question of the appellability of the action. The Sheriff is empowered to ascertain the value in any manner he pleases, but presumably he will, in considering the matter, follow the recognised principles which have hitherto guided the Court in assessing the value of such causes. The main principle which should guide the Sheriff in arriving at the determination of the value of the cause is to ask, by payment of what sum could the defender get rid of the action? since if a person be sued either to perform some specific act, or, failing performance, to pay a certain sum, the sum by payment of which he can get rid of the action is the value of the cause.[1]

4. If the value of the action be not disclosed, and in consequence the Sheriff determines that it is less than the statutory limit, his determination is final as regards the competency of the action on the ground of value, but not otherwise. The construction of this provision, which presents obvious difficulties, would appear to be as follows. If, on a requisition of either of the parties to an action, the value of which is not disclosed *ex facie* of the claim, the Sheriff determines the value of the cause, his determination is final on the question of the competency of the action as an action in the Sheriff Court *only*, or in the Sheriff Court or Court of Session, according to the value so determined. But his determination does not involve the decision of the competency of the action as regards any other ground, such as, *e.g.* that the decision of the action involves a question of *status*. If, therefore, the Sheriff is required to and does determine that the value of an action does not exceed £50, appeal to the Court of Session is wholly excluded. Though their value may be determined, actions containing conclusions *ad factum præstandum*, whether with or without pecuniary conclusions alternatively or in addition, are not summary causes, even if their value be determined to be under £50. But if in such actions the Sheriff determines their value to be under £50, appeal to the Court of Session is excluded. If not, their value is deemed to exceed £50 and appeal is competent.

**Mode of determining Value.**—In whatever way the Sheriff arrives at his determination, he will presumably be guided, both in actions concluding only for a payment of money, and in those con-

[1] N. B. Rly. Co. *v.* Arthur, 1889, 17 R. 30, *per* Ld. Shand.

taining mixed conclusions, by the rules which have been established by decisions under former practice.

1. *In Actions containing Pecuniary Conclusions.*—In such actions the value of the cause is the value of the sum craved in the initial writ, which, in order to make appeal competent, must be for a sum, exclusive of interest and expenses, exceeding £50. What precisely is meant by interest is not quite clear. But it has been held that in an action concluding for the statutory limit, "with interest from the date of citation," the action was, as regards value, subject to appeal.[1] There has, however, been no express decision on the question, whether "interest" includes interest past due or is confined to interest from the date of citation. The actual amount claimed in the initial writ is not necessarily, however, the sole factor in the determination of the value of the cause. Thus, though the claim of the pursuer may show that a sum less than £50 is due him on balance, if the balance has been arrived at by giving defender credit for such an amount of independent counter-claims as would otherwise have increased the balance due beyond the statutory limit, the action must be deemed to be over the limit, and appeal is competent.[2] On the other hand, if the counter accounts which are credited form part of the same transaction as that on which the principal claim is founded, and the whole balance does not exceed £50, appeal is excluded.[3] Thus, while appeals in a cessio presented under section 26 (4) of the Sheriff Court Act of 1876 (which is not repealed by the Act of 1907) must be treated precisely as if they were ordinary Sheriff-Court actions, the question of the competency of the value of the cause must be measured by the amount of the claim contained in the initial writ, such as, *e.g.*, an affidavit of claim in the cessio, and not by the value determined as a result of the judgment brought under review. Where, therefore, the affidavit in such a case is for an amount in excess of the statutory limit, the fact that the actual question raised in the appeal concerns the right to poinded goods of a value below that limit, is immaterial, and appeal is not excluded.[4] Again, in an action by a father, aged sixty-six, against one of four children, in which the amount claimed was half a crown a week, the Court held that the value of the cause

[1] Martin & Sons *v.* Robertson & Co., 1872, 10 M. 949.

[2] Inglis *v.* Smith, 1859, 21 D. 822.

[3] Stevens *v.* Grant, 1877, 5 R. 19.

[4] Henderson *v.* Grant, 1896, 23 R. 659.

could not be measured by the actual sum for which decree was craved, and that therefore appeal was competent.[1] Again, where, after a landlord had sequestrated, and his rent and expenses had been paid, a balance of less than the statutory limit was consigned, concerning which the tenant's other creditors had a litigation, it was held that the value of the action was not the amount consigned, but that about which the original litigation took place.[2] The Sheriff is empowered to determine the value at any stage of the cause. If, however, the value of the cause as originally raised exceeds the statutory limit, it is immaterial, so far as the value for appeal is concerned, that the interest of the pursuer falls below that limit subsequently. Thus an admission at the closing of the record that a sum has been paid, the result of which is to reduce the amount claimed below the statutory limit, does not effect its subsequent value for the purpose of appeal.[3] Nor does it affect the right of appeal that, subsequent to the closing of the record, the pursuer has restricted the amount for which he craves decree.[4] But a restriction below the statutory limit of the amount craved, prior to the closing of the record, renders the value of the cause that at which it is restricted.[5] And though the Court discourages appeals solely on questions of expenses, the principle is carried out consistently to its legitimate conclusion, that where the value of the cause has for any reason been reduced even to the vanishing point, the right of appeal remains as to the question of expenses so long as the merits remain open for discussion.[6]

If, therefore, the writ does not disclose the value of the cause as being over the appealable limit, the Sheriff, considering the value as estimated from the record according to the effect of a judgment in favour of either party, will determine the value accordingly. A case which *ex facie* is underneath the limit, may by its decision determine a question the value of which, when estimated pecuniarily, is above the limit. Thus, in an action concluding for a sum below the limit, the Court of Session held they had jurisdiction, because the real question in controversy was the validity of a contract the

[1] Hamilton *v.* Hamilton, 1877, 4 R. 688.

[2] Dobbie *v.* Thomson, 1880, 7 R. 983.

[3] Wilson *v.* Wallace, 1858, 20 D. 764; M'Kimmie's Trs. *v.* Armour, 1899, 36 S.L.R. 675.

[4] Tait *v.* Lees, 1902, 5 F. 304; Buie *v.* Stiven, 1863, 2 M. 208.

[5] Cairns *v.* Murray, 1884, 12 R. 167; *see* Soutar *v.* Mulhern, 1907, S.C. 723.

[6] *See infra*, Expenses, Appeals on Questions of.

actual consideration for which had been above the limit of the Sheriff's statutory privative jurisdiction.[1] Where the contract founded on is a continuing one, or where judgment in the action will infer a liability, or be *res judicata* between the parties on a question involving liability, for a sum in excess of the statutory limit, there is appellate jurisdiction, although the actual claim made in the initial writ be for a sum less than £50.[2] Thus, in the case of a lease where the particular sum in dispute was under the limit, but inasmuch as the lease was for seven years, and the other years when taken into consideration raised the sum above the limit, the Court held that appeal was competent.[3] The true test in such cases is, can the determination of the matter in dispute, whatever it be, be *res judicata* between the parties upon a matter which is likely, in the ordinary course of circumstances, and not merely in theory, to recur; or, in other words, is the Court, in the whole circumstances of the case, asked to decide a practical question of continuing liability?[4] If in such cases this test does not apply, appeal is excluded. Thus in an action for aliment concluding for an amount not exceeding the limit, the fact that more aliment might be required should the pursuer's ill-health continue, was held not to confer appellate jurisdiction.[5] And in an action for a rent, rate, or assessment of an amount not exceeding the limit, the value of the cause cannot be estimated as necessarily being over the limit, though the question to be determined is one which may subsequently arise between the parties,[6] the remedy in such cases, if the decision of the Court of Session be desired, being to bring an action of declarator.[7] Thus in a sequestration for a half-year's rent, the amount being below the limit, though the rent for the whole year exceeds it, the value of the cause must be held to be below the limit.[8] So also where a member of an association was sued for a call in amount below the limit, it was held that review was excluded, although the action raised the question of the defender's liability to contribute.[9]

[1] Brydon *v.* Macfarlane, 1864, 3 M. 7.

[2] Drummond *v.* Hunter, 1869, 7 M. 347; Cunningham *v.* Black, 1883, 10 R. 441.

[3] Drummond *v.* Hunter, *sup.*

[4] Paisley P. C. *v.* Glasgow P. C., 1907, S.C. 674, *per* Ld. Pres. Dunedin; Den *v.* Lumsden, 1891, 19 R. 77; Stirling P. C. *v.* Perth P. C., 1898, 25 R. 964.

[5] Macfarlane *v.* Stornoway Friendly Socy., 1870, 8 M. 438.

[6] Heddle *v.* Gow, 1880, 18 S.L.R. 96.

[7] Hogg *v.* Auchtermuchty Parish, 1880, 7 R. 986.

[8] N. B. Rly. Co. *v.* Arthur, 1889, 17 R. 30.

[9] Standard Shipowners', etc., Assocn. *v.* Taylor, 1896, 23 R. 870.

It does not affect the value of an action for the purpose of appeal that it concludes against more defenders than one, each being concluded against for a sum under the limit, provided that the aggregate claim is above the limit, and that the defenders have a community of interest to defend the action.[1]

2. *In Actions with Mixed Conclusions.*—In such actions, as has been seen, the principle on which the Sheriff should act in ascertaining their value is to consider what payment would enable the defender to rid himself of the action. If the purely pecuniary conclusion is the principal conclusion of the action, the *ad factum præstandum* conclusion being merely ancillary or adjected for the purpose of obtaining a decree in the event of the defender's failure to pay the pecuniary claim, no difficulty in arriving at the determination of the value of the cause can be experienced.[2] If the sum concluded for be below the statutory limit, then appeal will be clearly excluded. But even if the principal conclusion is *ad factum præstandum*, the pecuniary conclusion being only secondary or alternative, the value of the cause must still be estimated according to the value of the pecuniary conclusion.[3] The rule is that if the action give the defender an option of settling the pursuer's claim by a payment of money not exceeding the statutory limit, then the value of the action is the amount of such payment, and there is no right of appeal to the Court of Session.[4] If, on the other hand, the alternative conclusion to that *ad factum præstandum* be expressed in indefinite terms, as, for instance, for "£35 or such other sum as may be ascertained to be the value" of the *ad factum præstandum* conclusion, the value of the cause must be assessed as exceeding the statutory limit, because the sum of money by which the defender can rid himself of the action is indefinite, and therefore cannot be inferred to be below the limit at which appeal becomes competent.[5] The rules may be thus condensed:—If in an action containing such alternative conclusions the value of the cause is disclosed (*i.e.* the sum by which the defender may rid himself of the action), then that sum

[1] Dykes *v.* Merry & Cuninghame, 1869, 7 M. 603; Nelson, Donkin, & Co. *v.* Browne, 1876, 3 R. 810; Birrell *v.* Taylor, 1884, 12 R. 151; Brotherston *v.* Livingston, 1892, 20 R. 1.

[2] Cameron *v.* Smith, 1857, 19 D. 517.

[3] Singer Mfg. Co. *v.* Jessiman, 1881, 8 R. 695.

[4] Dickson *v.* Bryan, 1889, 16 R. 673.

[5] Shotts Iron Co. *v.* Kerr, 1871, 10 M. 195; Aberdeen *v.* Wilson, 1872, 10 M. 971.

must be held to be the value of the cause, and therefore to exclude appeal to the Court of Session. If, on the other hand, that value is not disclosed (*i.e.* if the pecuniary conclusion is so expressed as to leave the defender in doubt as to the amount of money, payment of which would enable him to rid himself of the action), then the value of the cause must be fixed by the Sheriff as being above the statutory limit, if the parties are to have an appeal to the Court of Session. In ascertaining the value of a cause for purposes of review, the Court of Session has always proceeded on stringent principles of construction. In view of the fact that the question of value is one of jurisdiction, it is *pars judicis* in every case to take note of the value of the cause; and even though the parties express their willingness to renounce the objection, the Court will not entertain an appeal if satisfied that their jurisdiction is statutorily excluded.[1] Nor will the Court allow the parties to escape the objection by stating a special case.[2]

**Classification of Appeals Competent.**—Appeals from the Sheriff Court to the Court of Session may be broadly divided into four classes:—

1. *Appeals for Review*, including appeals against (*a*) final or (*b*) interlocutory judgments pronounced by the Sheriff or Sheriff-Substitute in ordinary actions; (*c*) findings in law pronounced by the Sheriff in summary causes[3]; and (*d*) the verdict or judgment pronounced in a jury trial before the Sheriff.[3]

2. *Appeals by way of Removal or Remit*, including (*a*) removal of a cause in order to its trial by jury in the Court of Session; (*b*) removal of a cause *ob contingentiam*[4]; (*c*) remit of a consistorial cause to the Court of Session; and (*d*) remit or removal of a cause for procedure in the Court of Session.

3. *Appeals on Stated Case* under (*a*) The Agricultural Holdings Act, 1900, and (*b*) The Workmen's Compensation Act, 1907.

4. *Suspension and Reduction* of decrees, including (*a*) review, in certain cases, of decrees *in foro*; (*b*) review in certain summary actions, such as removings, warrants to imprison, etc.; (*c*) appeals

[1] Singer Mfg. Co. *v.* Jessiman, 1881, 8 R. 695.

[2] Bruce *v.* Henderson, 1889, 17 R. 276.

[3] The subject of appeals under these heads is treated of in the chapters dealing with these subjects.

[4] Such removals are dealt with in Chapter XVIII.

to set aside certain proceedings on the ground of illegality, incompetency, etc.

## I. Appeals for Review

**Final Judgment.**—A final judgment is an interlocutor of the Sheriff or the Sheriff-Substitute which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for.[1] Such an interlocutor is one, therefore, that disposes of the whole merits of the cause, puts the pursuer or defender out of Court, and leaves nothing to be done save to modify, tax, or decern for expenses.[2] But until the question of the liability of the parties for expenses is determined the subject-matter of the action is not disposed of or exhausted.[3] And if expenses are reserved in the interlocutor dealing with the subject-matter of the action, the interlocutor which finally disposes of the liability for expenses is the final judgment in the cause.[4] In a case in which a Sheriff having pronounced an order *ad factum præstandum*, refused to deal with the question of expenses till the expense connected with the operations he had ordered was ascertained, it was held competent to suspend the decree with the object of sisting its execution.[5] Under the similar provision in the Court of Session Act, 1868, which includes in the definition of a final judgment one which disposes of the competition between the parties in a process of competition, it was held that competitors whose claims had been refused might competently appeal, though the question as to their expenses was undecided.[6] A judgment by default,[7] and interlocutors sustaining dilatory defences,[8] or repelling the whole of defender's pleas and granting operative decree, though *quoad ultra* continuing the cause,[9] are appealable in respect they each finally dispose of the subject-

[1] Act, ss. 3 (h), 28; *cf.* C. of S. Act, 1868, s. 53, and Act of 1853, s. 24.

[2] M'Kenzie *v.* Bouttelleau, 1855, 17 D. 943.

[3] Greenock Parochial Bd. *v.* Millar, 1877, 4 R. 737; Russell *v.* Allan, 1877, 5 R. 22; Malcolm *v.* M'Intyre, 1877, 5 R. 22; Burns *v.* Waddell, 1897, 24 R. 325; Cal. Rly. Co. *v.* Glasgow Corporn., 1900, 2 F. 871.

[4] Baird *v.* Barton, 1882, 9 R. 970.

[5] Cal. Rly. Co. *v.* Cochrane's Trs., 1897, 24 R. 855.

[6] D. of Roxburghe, 1875, 2 R. 715.

[7] Robb *v.* Elgin, 1877, 14 S.L.R. 473.

[8] Whyte *v.* Gerard, 1861, 24 D. 102.

[9] Turner's Trs. *v.* Steel, 1899, 2 F. 363.

matter of the action. So, where a Sheriff pronounced an interlocutor finding in terms of certain declaratory conclusions, granting decree in terms of the prayer of the petition, making an award of the expenses, and *quoad ultra* continuing the cause and remitting to the Sheriff-Substitute for further procedure, the interlocutor was held to be appealable.[1] And an interlocutor refusing to repone against a decree in absence has been held to be appealable.[2] And while an appeal against an interlocutor deciding only the question of expenses is competent,[3] an interlocutor which merely decerns for expenses already awarded is not appealable.[4] An interlocutor sustaining the relevancy of the action and allowing a proof by writ or oath,[5] and one sustaining the competency of an action of multiplepoinding and ordering claims,[6] or ranking a claimant,[7] are not final judgments in the sense of the Act. An order for caption, not being strictly a step in the process between two litigants, is not an appealable interlocutor.[8]

**Interlocutory Judgments.**—An interlocutory judgment may be best defined by saying that it includes all judgments or decisions of the Sheriff or Sheriff-Substitute which are not final judgments. Of such judgments there are only three classes in which appeal to the Court of Session is competent. These are interlocutors—

1. *Granting Interim Decree* for payment of money, other than a decree for expenses,[9] however small the amount may be which is involved, provided the action be one in which appeal is otherwise competent, and the interim judgment be such as to authorise the extraction of the decree. Where, therefore, a judgment is such that it neither orders the payment of money nor disposes of the subject-matter of the action, there is no appeal. There is therefore no appeal against an order which merely orders interim consignation of money.[10] But an interim warrant to pay a consigned fund to a person other than the consignor is appealable.[11] An interlocutor

[1] M'Ewen *v.* Sharp, 1899, 1 F. 393; Malcolm *v.* M'Intyre, 1877, 5 R. 22.

[2] Smith *v.* Inglis, 1881, 18 S.L.R. 563; *see* M'Gibbon *v.* Thomson, 1877, 4 R. 1085.

[3] *See infra*, Expenses, Appeals on.

[4] Tennents *v.* Romanes, 1881, 8 R. 824; Thompson & Co. *v.* King, 1883, 10 R. 469.

[5] Shirra *v.* Robertson, 1873, 11 M. 660.

[6] Gordon *v.* Graham, 1874, 1 R. 1081.

[7] Strichen Endowments *v.* Diveral, 1891, 19 R. 79.

[8] Broatch *v.* Pattison, 1898, 1 F. 303.

[9] Act, s. 28 (a).

[10] Maxton *v.* Bone, 1886, 13 R. 912.

[11] Baird *v.* Glendinning, 1874, 2 R. 25; Sinclair *v.* Baikie, 1884, 11 R. 413.

granting[1] or refusing[2] interim interdict is not appealable to the Court of Session, nor is an interim award of expenses.[3]

2. *Sisting the Action,*[4] or equivalent to or inferring a sist of the action,[5] as, for instance, sisting process to enable the pursuer to find caution for expenses,[6] on the ground presumably that to delay the pursuer's claim may be equivalent to defeating it.

3. *Against which the Sheriff-Substitute or the Sheriff,* either *ex proprio motu* or on the motion of any party, *grants leave to appeal.*[7] This is a new provision. Formerly a Sheriff-Substitute might grant leave to appeal interlocutors not otherwise appealable to the Sheriff, but he had no power, nor had the Sheriff, to grant leave to appeal to the Court of Session. When it is said, therefore, that an interlocutory judgment, either of the Sheriff or of the Sheriff-Substitute, is not "appealable" to the Court of Session, it must be now, as it was not formerly, understood to mean "appealable without leave," and this distinction must be kept in view in applying, or seeking to apply, decisions of the Supreme Court on the subject pronounced prior to the Act of 1907.

**Form of Appeal.**[8]—The appeal is taken by the appellant or his agent (who must be duly authorised)[9] writing on the interlocutor sheet, "The pursuer (*or* defender, *or* other party) appeals to the (First *or* Second) Division of the Court of Session," and dating and signing the note.[10] The note of appeal may be lodged on a separate paper and lodged with the Sheriff-Clerk, if the interlocutor sheet is not in his hands, in the same way as in the case of an appeal from the Sheriff-Substitute to the Sheriff.[11] No provision to this effect existed under former procedure.

**Time of Appeal.**—An appeal for review of a final judgment, whether of the Sheriff or the Sheriff-Substitute, may be taken within three months from its date, if it has not been sooner implemented or extracted; any other appealable judgment, whether of

[1] Manson's Trs. *v.* Forsyth, 1883, 21 S.L.R. 167.

[2] Cathcart *v.* Sloss, 1865, 3 M. 521.

[3] Notman *v.* Kidd, 1872, 9 S.L.R. 292.

[4] Act, s. 28 (b).

[5] Watson *v.* Stewart, 1872, 10 M. 494.

[6] Horn & Co. Ltd. *v.* Tangyes, Ltd., 1906, 8 F. 475.

[7] Act, s. 28 (c).

[8] The form of appeal and the procedure following applies, it may be assumed, to appeals in summary as well as to those in ordinary actions.

[9] Stephen *v.* Skinner, 1863, 2 M. 287.

[10] Act, Rules 87, 93.

[11] Act, Rule 93; *see supra.*

the Sheriff or the Sheriff-Substitute, may be taken within fourteen days of its date, if it has not been sooner extracted or implemented.[1] The words "but not later" have been added to the clause in each case, presumably to show, what has always been recognised in practice, that neither Sheriff nor Sheriff-Substitute has any power to prorogate the time within which an appeal must be taken. The date of an interlocutor is the date on which it is entered in the books of Court, not that on which it is signed, if these dates differ.[2] As extract may be issued after the lapse of fourteen days, which corresponds with the period during which appeal in interlocutory judgments is competent. The appellant has in every case that time within which his right of appeal is indefeasible. After the lapse of fourteen days in the case of a final judgment, his right of appeal, which would otherwise subsist for three months, is defeated if in the meantime the judgment is either extracted or actually implemented. The extracting of a supplementary judgment decerning for taxed expenses does not affect the right of appeal against a prior final and unextracted judgment.[3] After the lapse of three months from the date of the interlocutor, appeal is incompetent even although the judgment has not been extracted.[4] Authority to issue extract "on caution being found" has been held not to authorise extract immediately caution was found, and thus to restrict the period within which appeal was otherwise available, but merely to add a condition to the ordinary time.[5]

**Notice of Appeal and Transmission of Process.**—On an appeal being taken, the Sheriff-Clerk (personally, and not by the hand of the agent of a party)[6] must, within two days, transmit the process to the Sheriff or to the Clerk of the Division to which appeal is taken,[7] as the case may be, and also send written notice of the appeal to the other parties or their agents. Failure to give such notice does not invalidate the appeal.[8] The Sheriff-Clerk should mark on the record not only that appeal has been lodged, but

[1] Act, Rules 86, 93.

[2] Act, Rule 83.

[3] M'Farlane *v.* Thomson, 1884, 12 R. 232.

[4] Thompson & Co. *v.* King, 1883, 10 R. 469.

[5] Simpson *v.* Jack, 1888, 16 R. 131.

[6] Innes *v.* Fife, 1859, 12 D. 1007.

[7] The Act, apparently *per incuriam*, specifies "*the* principal Clerk of Session." The Clerk of the Second Division is one of the two principal Clerks of Session.

[8] Act, Rules 88, 94.

also a certificate that intimation of the appeal has been made in terms of the Act.[1]

**Effect of Appeal.**—The effect of the appeal is the same as in the case of an appeal from the judgment of the Sheriff-Substitute to the Sheriff.[2] No difference exists, so far as the effect of the appeal is concerned, between an interlocutory and a final judgment.[3] The extract of an interlocutor which is not appealable, does not bar a subsequent review of that interlocutor in an appeal taken with reference to another.[4] The appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if taken by himself.[5]

**Subsequent Procedure** is regulated by the provisions of the Act of Sederunt of 10th March 1870, sec. 3.[6]

*Printing and Boxing Papers.*—The appellant must, during session, within fourteen days after the process has been received by the Clerk, print and box the note of appeal, record, interlocutors, and oral proof, if any, unless (by enrolment) within eight days after the process has been received by the Clerk he has obtained an interlocutor of the Court (or in vacation of the Lord Ordinary on the Bills) dispensing with printing in whole or in part. This provision does not apply to documentary evidence, which, however, must be printed before the hearing, so far as necessary to make the case intelligible.[7] The application to dispense with printing must be made within the eight days; and if that time is allowed to expire, the appellant's only remedy is to be reponed, on cause shown, after the appeal has been held to be abandoned, in terms of a subsequent provision of the Act of Sederunt.[8] If printing has been in whole dispensed with, the appellant must furnish to the Clerk of Court, and to the Clerk to the President of the Division (and, in practice, to the Clerk to each Judge of the Division), a MS. copy of the note of appeal. Copies of the record or proof are not necessary.[9] Printing may be dispensed with *in hoc statu*,[10] as where the appellant desires to make application for admission to the Poor's Roll;[11] and if so dispensed with, and the

[1] Chisholm *v.* Marshall, 1874, 1 R. 388.

[2] Act, s. 29, Rule 96.

[3] Cross *v.* Bordes, 1879, 6 R. 934.

[4] Weir *v.* Tudhope, 1892, 19 R. 858.

[5] Bell *v.* Andrews, 1885, 12 R. 961.

[6] *See* A. S. 5th January 1909, s. 1.

[7] Muir *v.* Mackenzie, 1881, 9 R. 10.

[8] Allan *v.* Sandeman, 1881, 8 R. 563.

[9] Dolan *v.* Anderson, 1885, 12 R. 1190.

[10] Ross *v.* Gray, 1887, 14 R. 768.

[11] Allan *v.* Sandeman, *sup.*

motion thereafter is refused, the fourteen days run from the date of refusal.[1] If the appellant fail within the fourteen days to print and box or lodge and furnish the papers required, he is held to have abandoned his appeal, and cannot insist therein, except upon being reponed. But where from honest mistake or excusable inadvertence an appellant fails to comply with the requisites of the Act of Sederunt as to print the note of appeal, or to print and box the proof along with the appeal, or where he even prints the wrong summons, the omission may be rectified, usually on payment of expenses, if the other side has not been prejudiced by the delay.[2] Where an appellant admitted that he had wittingly failed to lodge prints the Court dismissed the appeal.[3] And where a print failed to state the case properly, in respect that answers to amendments of the record were omitted, the Court held the defect fatal.[4] Defects in the print may involve the appellant in expenses.[5] During vacation the print or copy note (if printing has been dispensed with on application to the Lord Ordinary on the Bills) must be deposited with the Clerk within the fourteen days, and copies boxed or MS. copies furnished to the Judges on the first box or Sederunt day. Where an appellant through excusable error failed to lodge the papers on the first box day, he was allowed to lodge them subsequently.[6] The provisions as to finality are applicable only to interlocutors which can competently be appealed, and therefore do not apply where an appeal has been incompetently taken and abandoned, so as to exclude review of previous interlocutors in a subsequent appeal competently taken.[7] Where two appeals are taken in the same action, a reference printed on the second appeal to the print boxed in the former containing the record, proof, etc., satisfies the requirement of the Act of Sederunt.[8]

*Failure to lodge Print timeously.*—If the appellant fail to lodge and box the papers or furnish the copies required, he is held to have abandoned the appeal. He may, however, within eight days after

[1] Ross *v.* Gray, 1887, 14 R. 768.

[2] Young *v.* Brown, 1875, 2 R. 456; Walker *v.* Reid, 1877, 4 R. 714; Greig *v.* Sutherland, 1880, 8 R. 41; Lattimer *v.* Anderson, 1881, 9 R. 370; Harvey *v.* Lindsay, 1875, 2 R. 980; Dougan *v.* M'Creadies, 1885, 23 S.L.R. 133.

[3] Bell *v.* Bell, 1897, 24 R. 847.

[4] Lee *v.* Maxton, 1904, 6 F. 346.

[5] Roxburgh & Co. *v.* Barlas, 1876, 3 R. 288.

[6] Boyd, Gilmour, & Co. *v.* G. & S.-W. Rly. Co., 1888, 16 R. 104.

[7] Weir *v.* Tudhope, 1892, 19 R. 858.

[8] Dougall's Trs. *v.* Lornie, 1900, 2 F. 1123.

the appeal has been held to be abandoned, move the Court during session, or the Lord Ordinary on the Bills in vocation, to repone him and enable him to insist in the appeal. A reponing note is unnecessary.[1] The motion is granted only on cause shown, and subject to such conditions as to expenses, printing, etc., as the Court may see fit to impose. Thus the fact that the appellant's agent lived in Skye and he himself in Uist, was held a sufficient cause for reponing.[2] But the fact that verbal negotiations for a settlement were in progress was held insufficient.[3] And similarly, where an appellant acknowledged that he had wittingly failed to lodge prints, as he intended to move for a remit to another Court, the motion was refused.[4] On the other hand, short delays occasioned accidentally, as by the absence for two days of the appellant[5] or his counsel[6] from town, have been excused on payment of expenses. So, where the failure had been caused owing to the fact that appellant had been prevented through illness and absence from home from instructing an Edinburgh agent, he was reponed on payment of expenses.[7] And where a clerk miscalculated the days owing to a diary on which he relied omitting Sundays, the appellant was reponed.[8] But, as was pointed out in one case, the Act of Sederunt, being made on statutory authority, and superseding the antecedent statutory enactment, must be treated as if it were a Statute. If, therefore, the prints are not lodged within the prescribed time, and no motion is made to repone, the appellant must be held to have abandoned his appeal. Where, therefore, prints were lodged in vacation after the prescribed time, and boxed on the first box-day thereafter, the Court, holding that the provision in the A.S. had the force of a statutory direction, refused the appeal as incompetent.[9] And where the prints were boxed on the fifteenth instead of the fourteenth, the Court refused the appeal.[10]

Within the same eight days, that is, after the appeal is held to be abandoned, the respondent may print and box the papers, and if

[1] Greig *v.* Sutherland, 1880, 8 R. 41.

[2] Macquian *v.* Macdonald, 1871, 9 M. 743.

[3] Robertson *v.* Barclay, 1877, 5 R. 257.

[4] Bell *v.* Bell, 1897, 24 R. 847.

[5] Greig *v.* Sutherland, *sup.*

[6] Dougan *v.* M'Credies, 1885, 23 S.L.R. 133.

[7] Nisbet *v.* Corrance, 1905, 13 S.L.T. 287.

[8] Donald *v.* Irvine, 1904, 6 F. 612.

[9] Taylor *v.* Macilwain, 1900, 3 F. 1; *cf.* Walker *v.* Reid, 1877, 4 R. 714; Watt *v.* Joyce, 1879, 7 R. 126.

[10] Bennie *v.* Cross & Co., 1904, 6 F. 538.

he does so, both he and the appellant may insist in the appeal. If after the eight days the appellant is not reponed and the respondent has not printed, the appeal is held to be abandoned by both parties, and the interlocutors appealed against become final. The cause is re-transmitted to the Sheriff-Clerk, the interlocutor sheet bearing a certificate of the Clerk of Court that it is retransmitted in respect of the abandonment of the appeal. The Sheriff, upon motion, then grants the respondent £3, 3s. of expenses. When a Sheriff-Court decree has become final under this section of the Act of Sederunt, it cannot be set aside either by appeal or suspension.[1]

*Withdrawal of Appeal.*—The appellant may withdraw the appeal at any time on payment of expenses, but his withdrawal does not affect the right of the other parties to insist in the appeal as if they themselves had been the appellants. Section 96 of the Act of 1907 provides that the appellant shall not be entitled to "abandon" the appeal unless by consent of all parties or by leave of the Appellate Court. Abandonment is, however, as has been seen, a purely negative act of omission, and consists in the appellant's failure to take the necessary and proper means to prosecute his appeal. It is therefore wholly independent of the consent of any other party, since any party may, on the appellant's abandonment, take the necessary steps to prosecute the appeal for himself. The appellant therefore cannot abandon his appeal so as to prevent the other parties prosecuting it. But the withdrawal of the appeal is a different matter, and consists of a definite positive act on the part of the appellant. If the appellant offer to withdraw the appeal when it appears in the Single Bills of the Division, he is allowed to do so on payment of a fixed sum of £3, 3s. of expenses.[2] If he does not withdraw then and before the appeal is put out for hearing, he will be allowed to do so only on such expenses as the Court may see fit to award.[3] Thus the account may be sent to the Auditor to tax, and where the appeal has been sent to the Short Roll, and the respondent put to considerable expense, full taxed expenses will be allowed.[4] Where an appeal was withdrawn before it appeared on the roll for discussion, the respondent was held not entitled to the

[1] Park *v.* Weir, 1874, 12 S.L.R. 11; Watt Bros. & Co. *v.* Foyn, 1879, 7 R. 126; Mackenzie *v.* N. B. Rly. Co., 1879, 7 R. 128.

[2] Gentles *v.* Beattie, 1880, 8 R. 13.

[3] Johnston *v.* Rae, 1876, 3 R. 879; Stark *v.* M'Neil, 1877, 5 R. 196.

[4] Smith Sligo *v.* Knox, 1880, 8 R. 41; Little Orme's Hd. Limestone Co. *v.* Hendry & Co., 1897, 25 R. 124.

expense of printing certain correspondence, which, prior to the withdrawal and without communication with the appellant, he had printed at his own hands.[1]

**Hearing and Judgment.**—In deciding the case the Court will apply the law applicable to the circumstances, whether it has been pleaded or not,[2] a provision which, presumably, has been introduced into the Statute to prevent the necessity of additions to or amendments of the record where the averments on record are not sufficiently specific. Objections to the competency of the appeal may be considered and disposed of at the hearing,[3] though in general such objections should be stated and disposed of in the Single Bills.[4] If the case is not, in the opinion of the Court, ripe for judgment, they may remit to the Sheriff for further procedure, or proof or additional proof may be ordered in the appeal, to be taken in the way in which proofs are taken in the Inner House; or, where the case is suitable, the case may be ordered to be tried before a jury after due adjustment of issues.[5] The Court has also power to amend the record at any time on such expenses as they think proper,[6] and in exercising this power they may allow new grounds of action or defence to be stated.[7]

*Respondent failing to Appear.*—If the respondent fails to appear the Court will not on that account reverse the Sheriff's judgment, and the appellant must satisfy the Court by argument that the appeal should be sustained.[8]

*Expenses of Appeal.*—The Court must also dispose of the question of the expenses. The rule is that a general finding of expenses includes those incurred both in the Court of Session and the Sheriff Court.[9] An interlocutor dismissing the appeal, but making no award of expenses, does not carry the expenses of the appeal.[10] If no expenses are awarded, the Sheriff cannot afterwards deal

[1] Gilchrist & Co. *v.* Smith, 1901, 3 F. 329.

[2] C. of S. Act, 1868, s. 72.

[3] Hillhouse *v.* Walker, 1891, 19 R. 47.

[4] Ross *v.* Brims, 1878, 15 S.L.R. 438.

[5] Macdonagh *v.* M'Lellan, 1886, 13 R. 1000; Gorman *v.* Morrison, 1885, 12 R. 1073.

[6] C. of S. Act, 1868, s. 72.

[7] Gibson *v.* Smith, 1870, 8 M. 445; Rose *v.* Johnston, 1878, 5 R. 600.

[8] Nicholson *v.* Munro, 1877, 4 R. 434; Alder *v.* Clark, 1880, 7 R. 1093; Aitken *v.* Robertson, 1880, 8 R. 12; Dunbar *v.* Macadam, 1884, 11 R. 652.

[9] Halbert *v.* Bogie, 1857, 19 D. 762.

[10] Macdonald *v.* Maceachan, 1880, 7 R. 574.

with the matter, unless the case is remitted to him for further procedure.[1]

**Possession pending Appeal.**—The rules regulating interim possession are the same as in the case of an appeal from the Sheriff-Substitute to the Sheriff.[2] It is not competent, pending the appeal, to make application to the Court to regulate interim possession, such application being competent only to the Sheriff.[3]

### II. Removal to Court of Session for Jury Trial

**Causes in which Competent.**—In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under that Act) where the claim is in amount or value above £50 and an order has been pronounced allowing proof (other than an order for proof to lie *in retentis* or for recovery of documents), it is, within six days thereafter, competent to either of the parties, who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried. But the Court of Session may, if it thinks the case unsuited for jury trial, remit the case back to the Sheriff, or to a Lord Ordinary, or send it for proof before a Judge of the Division before whom the cause depends.[4]

*Value of Cause.*—The claim must be in amount or value above £50. Where the claim is simply pecuniary, and is for a sum of money exceeding £50, that of course is the "amount or value of the cause." Where the claim is not simply pecuniary, the Sheriff will determine its value under section 9 of the Act. If he determines that value to exceed £50, appeal is competent; if otherwise, it is not. The words "exclusive of interest and expenses" must, it would appear, be read as occurring after the sum of £50, because otherwise the action is one which must remain in the Sheriff Court.[5]

[1] M'Gillivray *v.* Macintosh, 1891, 19 R. 103.

[2] Act, Rule 91, *see supra*.

[3] Trainer *v.* Renfrewshire Dist. Com., 1907, S.C. 1117.

[4] Act, s. 30.

[5] Act, s. 7.

*At what Stage Competent.*—The appeal can be taken only after proof has been allowed. The action must therefore have been held relevant by the Sheriff. Under the provisions of section 40 of the Judicature Act of 1825 and section 73 of the Court of Session Act of 1868, both repealed by the Act of 1907, in virtue of which appeal for jury trial in the Court of Session was formerly competent, it was held to be competent to appeal against the allowance of proof for the purpose of having the relevancy of the cause tried by the Court of Session, even although the actual trial of the cause by jury was not contemplated. Section 30 of the Act of 1907 provides that a cause which has been appealed to the Court of Session for jury trial "shall be so tried." But these words can have no meaning other than that the cause shall be so tried provided a relevant case for trial is disclosed. And therefore, although the section does not in terms provide that in the event of the cause being decided by the Court to be irrelevant it shall be dismissed, it is not open to doubt that the Court inherently possesses the power so to deal with the case, as well as the express power to remit it back to the Sheriff or to a Lord Ordinary, or to send it for proof before one of the Judges of the Division. It may, therefore, be assumed to be clearly competent now, as it was formerly, to appeal for jury trial to the Court of Session against an allowance of proof, which inferentially affirms the relevancy of the case, for the express purpose of obtaining the judgment of the Court of Session on that question.[1] The appeal, which when lodged supersedes the order for proof, may be taken any time within six days of the interlocutor allowing proof. But an appeal to the Sheriff from the interlocutor of the Sheriff-Substitute, before an appeal to the Court of Session is taken, suspends the right of appeal until the issue of the Sheriff's judgment.[2] The appeal must be timeously taken.[3] The date, within six days of which the appeal must be taken, is fixed by the interlocutor actually allowing proof, not by that of a subsequent interlocutor appointing a commissioner to take it, or an interlocutor appointing a

[1] In view of the fact that the A. S. of 5th January 1909 expressly states that questions as to the competency or relevancy of the cause will be decided when the case comes up in the single Bills or in the Summar Roll, it appears to be superfluous to emphasize the point.

[2] M'Arthur *v.* Boucher, 1887, 15 R. 117.

[3] *See* Crawford *v.* Simpson, 1901, 38 S.L.R. 272; Duff *v.* Steuart, 1881, 9 R. 17.

new diet of proof.[1] The proof allowed must be a proof at large or upon the merits, though it may be of only part of the case.[2] Thus an appeal against an interlocutor allowing a proof upon a defence stated in bar of an action of damages for personal injury is incompetent.[3] But an interlocutor allowing a proof before answer,[4] or *habili modo*,[5] is competently appealable. But there is no appeal against an interlocutor limiting a proof by writ or oath,[6] nor against one ordering the examination of a witness.[7] After a proof, in the Sheriff Court, though only of part of the cause, appeal is incompetent.[8] So a remit of consent to a man of skill to report as to possession is proof, and therefore renders a subsequent appeal incompetent.[9] And an interlocutor allowing a proof before answer "of consent" cannot be appealed against.[10]

**Procedure in Appeal.**—The procedure is regulated by the Act of Sederunt of 5th January 1909. The party desiring the cause to be remitted, writes on the interlocutor sheet, "The pursuer (or defender or other party) requires the cause to be remitted to the (First *or* Second) Division of the Court of Session." The note being signed by the party or his agent, and dated. Within two days thereafter the Sheriff-Clerk transmits the process to the Clerk of the Division to which the cause is remitted (who notes on the interlocutor sheet the date of its receipt), and also sends written notice of the application to the opposite party or his agent. Failure to give such notice does not invalidate the remission, but the Court may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper. Upon the process being remitted, the same regulations as to printing, boxing, lodging, etc., apply as in the case of appeals for jury trial

[1] Kinnes *v.* Fleming, 1881, 8 R. 386; Williams *v.* Watt & Wilson, 1889, 16 R. 687; Davidson *v.* Davidson's Exrs., 1891, 18 R. 1069; Hillhouse *v.* Walker, 1891, 19 R. 47.

[2] Conroy *v.* Inglis, 1895, 22 R. 650; M'Cafferty *v.* M'Cabe, 1898, 25 R. 872.

[3] Curran *v.* M'Alpine & Sons, 1898, 1 F. 326; M'Coll *v.* Gardiner & Co., 1898, 25 R. 395.

[4] Stewart *v.* Rutherford, 1862, 24 D. 1442.

[5] Robertson *v.* E. of Dudley, 1875, 2 R. 935.

[6] Shirra *v.* Robertson, 1873, 11 M. 660; Wilson *v.* Brackenridge, 1888, 15 R. 587; Glasgow Central Stores *v.* Goodson, 1901, 3 F. 1075.

[7] Turner *v.* Gibb & M'Donald, 1826, 4 S. 455.

[8] Gill *v.* M'Ra, 1832, 10 S. 552.

[9] Tulloch *v.* Mackintosh, 1838, 16 S. 983.

[10] Paterson *v.* Kidd, 1896, 23 R. 737; *see* Fleming *v.* Eadie, 1897, 25 R. 3; Whyte *v.* Whyte, 1895, 23 R. 320; Morrison *v.* Mackay, 1895, 2 S.L.T. 502.

under the Act of Sederunt of 10th March 1870, with this qualification, that in the event of an application for the remission of the cause being abandoned or being held to be abandoned, the docquet written by the Clerk of Court states that the cause is retransmitted in respect of the abandonment of the application to remit to the Court of Session. Where an application for a remit is offered to be abandoned, the Court have a discretionary power to fix the award of expenses on which such abandonment may be permitted.[1] Upon the appearance of the cause in the Single Bills, parties are heard on any motion to retransmit the cause to the Sheriff Court, or directed against the competency of the remission. If the motion to retransmit is refused and the remission held competent, the further procedure in the cause (including all questions as to its competency or relevancy) are determined either in the Single Bills or in the Summar Roll as the Division may think fit. If there be no objection to the competency of the remission, or if such objection is stated and repelled, issues for the trial of the cause are ordered within a certain fixed time. The issues are printed and boxed, and are adjusted in the Single Bills, unless the discussion is likely to be prolonged, in which case they are sent to the Summar Roll for discussion. But the Court is not bound to send the case to a jury if satisfied that it may be more properly disposed of otherwise. The question has been dealt with in many decisions, which are in some cases at first sight not very consonant. The principles deducible from the authorities were, in a recent case, summarised by the Lord President.[2] That summary now embodies the principles which will in future guide the Court in dealing with applications from the Sheriff Court for trial of a cause by jury in the Court of Session:—1. When a case is appealed for jury trial the Court is not bound to grant a jury trial. 2. It may decide the case on any legal ground which is capable of disposing of the case without inquiry. 3. It may order inquiry by some other method than jury trial, if it considers jury trial unsuitable; 4. Such inquiry may be by proof, either (*a*) before a judge in the Court of Session, or (*b*) before the Sheriff. 5. In deciding between the two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the

[1] M'Guire *v.* Union Cold Storage Co., 1909, 1 S.L.T. 38.

[2] Sharples *v.* Yuill & Co., 1905, 7 F. 657.

House of Lords on the facts. 6. In deciding whether a case is or is not suitable for jury trial, it will apply the same criterion as it does in cases raised before the Court of Session, that is, it will consider whether the action is of the class specially appropriated by Statute to jury trials, and if so whether there is any special cause for not so trying it. 7. As to amount, it will be guided by the standard fixed by the Legislature (now £50); so that, unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to more than £50, it will not refuse a jury trial to an otherwise appropriate case. These principles have been applied in subsequent cases.[1]

### III. Removal to Court of Session for Procedure

The following classes of actions may, at the closing of the record or within six days thereafter, be required by either party to be remitted to the Court of Session :—

1. Actions relating to questions of heritable right or title where the value in dispute exceeds £50 by the year or £1000 in all.

2. Actions relating to the right of succession to moveables where the value of the subject in dispute exceeds £1000.

3. Actions relating to division of commonty, or division, or division and sale of common property, where the value of the subject in dispute exceeds £50 by the year or £1000 in all.[2]

The procedure in the removal of such actions is detailed in the Act of Sederunt of 5th January 1909, and is the same as that in appeal for jury trial.

Applications for removal competent under any particular Statute, but not specifically dealt with in the Act of 1907, may competently be effected under the provisions specified in the particular Act, any right of appeal competent under a previous Act being unaffected by the provisions of the Act of 1907.[3]

[1] Dawson *v.* Stewart & Shaw, 1905, 7 F. 769 ; M'Laughlan *v.* Clyde Valley Electrical Power Co., 1905, 8 F. 131 ; Smellie *v.* Whitelaw, 1907, 44 S.L.R. 586.

[2] Act, s. 5.

[3] Act, ss. 7, 28 ; *see* Guardianship of Infants Act, 1886, s. 10 ; Rivers Pollution Act, 1876 ; Midlothian C. C. *v.* Pumpherston Oil Co., 1902, 4 F. 996.

### IV. Remit of Consistorial Cause to Court of Session

Actions of separation and aliment, and those relating to the custody of children, may at any stage, and either *ex proprio motu* of the Sheriff or on cause shown, be remitted to the Court of Session. The procedure to be followed in making such remits is directed by the Act of Sederunt of 5th January 1909, and is the same as in the case of appeal for jury trial. Where a remit is ordered *ex proprio motu* of the Sheriff, the pursuer of the action is held to be the appellant and the defender the respondent.[1]

### V. Appeals on Stated Case

**Agricultural Holdings Act, 1908.**—If in an arbitration under the Act the arbitrator states a case for the opinion of the Sheriff on any question of law, the opinion of the Sheriff so stated is final, unless within twenty days of the date of such opinion a note of appeal, written at the end or on the margin of the interlocutor sheet, is lodged with the Sheriff-Clerk. The note of appeal must specify the particular Division to which appeal is made, and be signed and dated. Within two days thereafter the Sheriff-Clerk must send notice of the appeal to the respondent or his agent, and transmit the process to the Clerk of the Division of the Court to which appeal is taken, who subjoins a note of the date of its receipt. Failure by the Sheriff-Clerk to give notice to respondent or his agent does not invalidate the appeal. The procedure after the process has been received by the Clerk of the Division is the same as that in the case of ordinary appeals.[2]

**Workmen's Compensation Act, 1906.**—Where an application is made to the Sheriff as arbitrator under the Act, either party may require him to state a case on any question of law determined by him to either Division of the Court of Session, who may hear and determine the same, and remit to the Sheriff with instructions as to the judgment to be pronounced. The procedure is regulated by the Act of Sederunt of 26th June 1907, sec. 17.

[1] A. S. 5th January 1909.

[2] A. S. 11th June 1901. The new A. S. has not yet been issued.

### VI. Suspensions and Reductions in Court of Session

**When Competent.**—After decree has been pronounced, there are three methods by which an aggrieved party may, unless otherwise precluded by Statute, obtain redress. He may (1) appeal for review, bring (2) a suspension, or (3) a reduction, of the decision complained of. Prior to extract of the decree, appeal for review is the appropriate mode of obtaining redress. Where a charge has been given or threatened on an extracted decree, suspension is the appropriate mode, and when neither of these modes is possible, reduction of the decree is still competent. Suspension is therefore incompetent where appeal is competent, but unless specially excluded, is competent where appeal is excluded or no longer competent.

*Of Decrees* in foro.—Suspension is thus a competent mode of review in cases after extract of the judgment, or after the lapse of three months from the date of judgment, provided the interlocutor under review (*a*) has not been implemented, (*b*) is reviewable under section 28 of the Act of 1907, and (*c*) the value of the cause is above £50. Suspension, as well as other modes of review, is excluded in cases under £50 in value. If an appeal has been taken and disposed of, even though it may have been dismissed without a judgment on the merits, as where an appeal has been abandoned owing to failure to print a second application for review by presenting a note of suspension, is incompetent.[1] But though the decree itself has been implemented, where expenses, if decerned for, have been paid, suspension as of a threatened charge on the decree for expenses is competent.[2] Suspension assumes the possibility of a charge following on the decree, and as no charge is competent on a decree of absolvitor, neither such decree itself nor a decree for expenses following upon it, can be suspended on any ground involving the merits of the decree. Review of the decerniture for expenses contained in or following on a decree of absolvitor, on grounds touching the merit of that decree, involves review of the decree itself. Therefore, though a charge may proceed on the decree, suspension is incompetent. When, however, objection to the decerniture or the charge for expenses can be separated from the

[1] Watt Bros. *v.* Foyn, 1879, 7 R. 126; Mackenzie *v.* N. B. Rly. Co., 1879, 7 R. 128.

[2] Tweddel *v.* Duncan, 1840, 2 D. 808.

merits, suspension is competent. Thus suspension was held competent where the objection was that no authority for raising the action had been given.[1] Suspension is competent where the decree of the Sheriff contains any order for the payment of money other than a decree for expenses,[2] or for the performance of any act on which execution is competent against the property or person of the debtor.[3] Interim decrees for payment of money may be suspended in the same way as final decrees. But interlocutors granting interim decree *ad factum præstandum*, as being one of the class in which appeal to the Court of Session is incompetent, cannot be suspended. But although review of such interlocutors by suspension is incompetent, suspension of a charge on such a decree, where it does not involve a review of the merits, is competent, till such time as the complainer can competently bring the merits before the Court.[4] It is not a competent ground of suspension of a final decree that it has been induced by fraud.[5]

*In Summary Actions* such as removings and ejections, where the extract is issued without giving time for appeal, and in law-burrows and warrants to imprison where the warrant is issued at once, suspension is the proper mode of review. In an action of removing where there is no appeal, suspension is incompetent.[6]

*To set aside Proceedings, Decree, or Diligence*, on the ground of incompetency, informality, or irregularity, suspension is the appropriate remedy. Thus suspension is the mode of redress which should be resorted to when the Sheriff exceeds his jurisdiction and no other mode of redress is open.[7] So suspension was held competent where a Sheriff, having ordered specific performance of an act, refused to deal with the question of expenses till the expense of the operation he had ordered was ascertained.[8]

**Proceedings in Suspension.**—The suspension is presented in the Bill Chamber of the Court of Session, and the suspender must in general find caution to implement the decree, and for expenses, before being allowed to proceed. Juratory caution is, however,

[1] Menzies *v.* Caldwell, 1834, 12 S. 772.

[2] Simpson *v.* Young, 1852, 14 D. 990.

[3] Lamb *v.* Thomson, 1901, 4 F. 88.

[4] Wilson *v.* Bartholomew, 1860, 22 D. 1410.

[5] Smith *v.* Kirkwood, 1897, 24 R. 872.

[6] Fletcher *v.* Davidson, 1874, 2 R. 71.

[7] Sinclair *v.* Oliver, 1887, 15 R. 185.

[8] Cal. Rly. Co. *v.* Cochrane's Trs., 1897, 24 R. 855.

sometimes received.[1] The Court is limited to the alternative of sustaining or reversing the decree, and cannot amend it.[2]

**Reduction.**—Where suspension is incompetent, and in other cases should the complainer prefer it, the remedy of reduction remains open[3] in all causes exceeding £50 in value. Reduction is the appropriate remedy where a decree of absolvitor with expenses is pronounced,[4] or where a decree by default is granted without a formal order being pronounced,[5] or where a decree is pronounced before the expiry of the time for lodging defences.[6] Reduction of an extracted final judgment is competent, and it is competent to add to the conclusion for reduction such declaratory conclusions as may tend to elucidate the rights of parties.[7]

**Proceedings in Reduction.**—The pursuer of the action is not bound to find caution, and the raising of the action does not stay execution.[8] The action is conducted in every respect like any other action of reduction in the Court of Session.

[1] Logan *v.* Weir, 1870, 8 M. 1009.
[2] Lyon *v.* Irvine, 1874, 1 R. 512.
[3] Scoular *v.* M'Laughlan, 1864, 2 M. 955; M'Leod *v.* Collie, 1869, 42 Jur. 62.
[4] Whyte *v.* Vallance, 1835, 13 S. 470.
[5] Macdonald *v.* Mackessack, 1888, 16 R. 168.
[6] Mackenzie *v.* Munro, 1894, 22 R. 45.
[7] Taylor's Trs. *v.* M'Gavigan, 1896, 23 R. 945; Matthewson *v.* Yeaman, 1900, 2 F. 873.
[8] Holmes *v.* Tassie, 1828, 6 S. 394.

# CHAPTER XXXVII

## EXPENSES

### I. Award of Expenses


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**The Right to Expenses.**—The matter of the award of expenses is one which is entirely within the discretion of the Court, and as to which the Court is absolute master,[1] but that discretion is now exercised in general in accordance with well-settled principles.

[1] Mitchell *v.* Baird, 1902, 39 S.L.R. 681, *per* Ld. Kinnear; *see* p. 114.

And while a crave for expenses, though not specially enjoined by the Act of 1907 as it was by the Act of 1876, should always (at least *ob majorem cautelam*) be inserted in the initial writ, the Court possesses an inherent power to find any one or more of the parties to an action liable in expenses to all or any of the other parties, without express conclusions therefor.[1] The broad general rule with regard to expenses, to which the other rules are corollaries or from which they are deductions, is that "expenses follow success," the *ratio* of the rule being that the successful party by being forced to undertake a litigation in vindication or defence of his right, which the Court by its judgment declares to have been unwarranted, has been put to wholly unnecessary expense, for payment of which the unsuccessful party is therefore by his conduct responsible.[2] It is for the Court to determine what constitutes success, but generally speaking that party will be considered successful who obtains a substantial proportion of that for which he litigates. To the general rule there are exceptions. It is competent to the Sheriff to disallow all charges for papers or parts of papers, or particular procedure or agency which he may consider irregular or unnecessary.[3] If the successful party have claimed an exhorbitant amount wholly out of proportion to that which he obtains, he may be refused expenses altogether, or he may be allowed only modified expenses.[4] Where the Court is of opinion that the expense of the action, or of any part of it, has been occasioned by the improper conduct of the successful party, it may award such expense to the unsuccessful party or it may find neither party entitled to it.[5] For example, where a schoolmaster sued a School Board for a retiring allowance, to which ultimately he was found not entitled, the Court awarded him his expenses on the ground that by refusing it without stating any reasons for their refusal, the Board had rendered the action necessary.[6] Similarly, a railway company who, as defender, was ultimately successful, was found liable in expenses in respect of its having thrown obstacles in the way of the pursuer's agent and so prevented the precognition of necessary witnesses.[7] So the

[1] Campbell *v.* Blackwood, 1862, 1 M. 1; M'Donald *v.* M'Donald, 1879, 6 R. 1011.

[2] *See* Wood *v.* Mackay, 1906, 8 F. 625.

[3] A. S. 10th April 1908, s. 10.

[4] *See infra*, Modification of Expenses.

[5] Kirkpatrick *v.* Irvine, 1848, 10 D. 367, *per* Ld. Jeffrey.

[6] Robb *v.* Logiealmond School Board, 1875, 2 R. 698.

[7] Barrie *v.* Cal. Rly. Co., 1902, 5 F. 30.

expense occasioned by unnecessary or improper pleadings[1] or procedure,[2] or of an incompetent or unnecessarily prolix proof,[3] may be awarded against the party who caused it, whether he be ultimately successful or not, and whether it have been caused through his fault or that of the judge.[3] Where a long proof was held by the Sheriff, much of which was considered by the Court to be useless, one-half of the expense occasioned by it was disallowed.[4] And expense so occasioned may be given to neither party,[5] as well as against the party who occasions it. So expenses may be refused to the successful party on the ground of his misconduct or bad faith. Thus, where the Court held that the successful party had intentionally trapped his opponent into Court, expenses were given to neither party.[6] And where in an action a plea of triennial prescription was sustained, but the debt was subsequently found due, full expenses were awarded against the defender.[7] Where, on the other hand, the Court is of opinion that the unsuccessful party was justified in raising or defending the action, it may award him his expenses. Generally speaking, in actions raised to determine questions connected with the administration of trusts or involving the construction of testamentary writings, all the parties to the suit are entitled to their expenses out of the trust funds. But an action for determining a question of domicile does not fall under this rule, and in such cases the ordinary rules as to awarding expenses apply.[8] While the idea cannot be countenanced that, when a will is challenged, the trustees acting under it are invariably entitled at the expense of the estate, and no matter what the circumstances may be, to defend the action, it may be said that in general trustees will be so entitled; and as once such expenses are allowed the trustees, they become expenses really of administration and not of litigation, they will therefore be allowed to be taxed as between agent and client.[9] Similarly, in actions which are raised to remove a justifiable objection to a title, the Court will award the unsuccessful

[1] Johnson *v.* Croall, 1844, 6 D. 410; Solway Junction Rly., 1873, 10 S.L.R. 442.

[2] E. of Minto *v.* Pennell, 1873, 1 R. 156; Couper *v.* Burn, 1860, 22 D. 1021.

[3] Dick & Stevenson *v.* Mackay, 1880, 7 R. 778.

[4] Ralston *v.* Cal. Ry. Co, 1878, 5 R. 671.

[5] Milne Home *v.* Comrs. of Duns, 1882, 9 R. 924.

[6] Manners *v.* Fairholm, 1872, 10 M. 520.

[7] Cullen *v.* Smeal, 1855, 17 D. 636.

[8] Brooks *v.* Brooks' Trs., 1902, 4 F. 1014.

[9] Merrilees *v.* Leckie's Trs., 1908, S.C. 576, *per* Ld. Pres. Dunedin.

party his expenses. While, for instance, there is no uniform rule by which a purchaser objecting to a title on plausible grounds is entitled to the expense of having its validity established,[1] it may be stated as a general principle that if the objection be serious, the purchaser will be awarded his expenses; while, if frivolous, expenses may be awarded against him.[2] Thus, in the case of a purchase of heritage where the purchaser objected to the title offered, it was held, on the seller suing for implement, that although the objection of the purchaser to the title offered was ill founded, it was not frivolous, and that therefore the pursuer, though successful, was not entitled to expenses.[3] If the objection of the purchaser be such that it can be referred neither to the one category nor the other, expenses may be awarded to either party,[4] or part may be allowed and part disallowed.[5]

The exception to the general rule, that a pursuer who demands an exhorbitant amount may forfeit his right to expenses or may have expenses awarded against him, does not apply to actions of damages in which a random sum is claimed, or in which an award of a sum less than that originally demanded is obtained. Thus a pursuer who claimed £500 as compensation for the death of her husband occasioned through the defender's fault, and who actually obtained an award of £15, was allowed her full expenses.[6] Similarly, in actions for defamation of character, the pursuer is in general entitled to full expenses, even although the actual damages which he obtains are purely nominal,[7] on the ground that in such actions the main object of the pursuer is to clear his character of the aspersions cast upon it. That rule does not, however, apply to actions other than those of defamation, where slandererous statements are made on record. Thus, where in an action of damages for breach of promise the defender made attacks upon the pursuer's character, the Court followed the ordinary rules as to awarding expenses, and paid no attention to the pursuer's contention that expenses should

[1] Dundee Calendering Co. *v.* Duff, 1869, 8 M. 289; *see per* Ld. Pres. Inglis.

[2] Kerr *v.* M. of Ailsa, 1854, 17 D. (H.L.) 11; Roscoe *v.* Mackersy, 1905, 7 F. 761.

[3] Walter's Trs. *v.* O'Mara, 1902, 9 S.L.T. 335 (O.H.); Walker *v.* Galbraith, 1895, 23 R. 347; Howard & Wyndham *v.* Richmond's Trs., 1890, 17 R. 990.

[4] Dundee Cal. Co. *v.* Duff, *supra*.

[5] Lamb's Trs. *v.* Reid, 1883, 11 R. 76; Cameron *v.* Williamson, 1895, 22 R. 293.

[6] Galloway *v.* Mackenzie, 1860, 33 Jur. 48.

[7] Rae *v.* M'Lay, 1852, 15 D. 30.

be awarded her on the ground that since slanderous statements had been made with reference to her, she was entitled to publicly refute them.[1] There may, however, be circumstances in which a successful defender in an action of defamation may be entitled only to modified expenses, or to none at all.[2] Thus, in an action of damages in respect of a slander contained in a letter, which the Court dismissed as irrelevant, the defender was refused his expenses on the ground that the letter, though not actually slanderous, was "extremely foolish."[3] And in another action of damages for slander, the pursuer averred that he had been convicted of "bird-liming," and that the defender had described his operations as those of a thief. The Court dismissed the action, but found the defender not entitled to expenses, as he had brought the action on himself by using language which was inaccurate and exaggerated.[4] In actions of defamation, the fact that the defender makes an apology which the pursuer subsequently accepts, does not in general prevent the pursuer from obtaining an award of expenses, even though the defender does not admit having uttered the slanderous words imputed to him, but bases his apology on the ground that if he uttered them he is willing to withdraw them and apologise for their utterance.[5]

**Divided Success.** — Where neither party has been wholly successful, the expenses may be awarded to neither party,[6] or they may be awarded to the parties proportionately to their respective successes,[7] or the party who on the whole has obtained the greater success may be awarded his expenses subject to modification.[8] Thus, where the unsuccessful party can show that he was successful as regards one part of the case, and that there was some special expense connected with it, he will in general be awarded that expense.[9] The rule has, however, no application in cases where the pursuer has two separate grounds of action, and is successful with regard to only one of them. In such cases the pursuer will generally be awarded his expenses, unless it can be shown that

[1] Brodie *v.* Macgregor, 1901, 4 F. 93.

[2] Shepherd *v.* Elliot, 1896, 23 R. 695; *see infra*, Divided Success.

[3] Wardlaw *v.* Drysdale, 1898, 25 R. 879.

[4] Campbell *v.* Ritchie & Co., 1907, S.C. 1097.

[5] Hunter *v.* Russell, 1901, 3 F. 596.

[6] Dalkeith Pol. Comrs. *v.* D. of Buccleuch, 1889, 16 R. 575; Cuthbert *v.* Whitton, 1888, 16 R. 259.

[7] Stoppel *v.* M'Laren, 1850, 13 D. 345.

[8] Butler *v.* Mags. of Dundee, 1886, 14 R. 191.

[9] Johnson *v.* Croall, 1844, 6 D. 410; Campbell *v.* Gordon, 1844, 6 D. 1097; Stoppel *v.* M'Laren, *sup.*

separate and extra expenses were occasioned to his opponent on the ground with regard to which he is unsuccessful.[1] Where in one case the Lord Ordinary was of opinion that the evidence led on both sides was of such an unsatisfactory character as to justify him in finding neither party entitled to expenses, the Court, reaffirming the established rule that expenses follow the result, awarded the successful party his expenses in the usual way.[2] In an action with reference to a contract, however, it was held that in respect the defenders had expressed their willingness, prior to the commencement of the litigation in which they were unsuccessful, to resort to arbitration as provided for in the contract, they were not liable in expenses, but that, as they had at the outset repudiated liability, they were not entitled to expenses, and that therefore neither party was entitled to expenses.[3] A modification of the expenses in the case of partial success does not interfere with the ordinary rules of taxation of the successful party's account.[4] Thus, where a pursuer, who was only partially successful, was found entitled to two-thirds of the expenses as the same might be taxed, it was held that the Auditor had acted rightly in disallowing all expenses clearly connected with that part of the case as to which the pursuer had been unsuccessful, before deducting the one-third.[5] The rule regarding expenses in the case of divided success does not apply to actions of damages for defamation of character, in which if successful the pursuer usually gets his expenses, although the actual award which he obtains is purely nominal.[6] Thus, where in a jury trial in the Court of Session the pursuer obtained two issues, and the defender, who pleaded *veritas*, was allowed counter-issues, it was held that although the pursuer was successful in one issue and unsuccessful in the other, he was entitled to his full expenses.[7] And where a jury found for the defender upon the pursuer's issue, but found it unnecessary to answer the defender's counter-issue, a motion to disallow the expenses of the counter-issue was refused.[8]

[1] Robertson *v.* Ronaldson, 1822, 1 S. 392 ; *but see* Stoppel *v.* M'Laren, 1850, 13 D. 345.

[2] Wood & Co. *v.* Mackay, 1906, 8 F. 625.

[3] Robertson *v.* Brandes, Schönwald, & Co., 1907, S.C. 1158.

[4] M'Elroy *v.* Tharsis Co., 1879, 6 R. 1119.

[5] Arthur *v.* Lindsay, 1895, 22 R. 904 ; Strang *v.* Brown, 1882, 19 S.L.R. 890.

[6] Rae *v.* Maclay, 1852, 15 D. 30.

[7] Kessack *v.* Kessack, 1899, 1 F. 398.

[8] Campbell *v.* Scot. Educ. News Co., 1906, 8 F. 691.

**Modification of Expenses.**—In all cases the Sheriff may direct that expenses shall be subject to modification.[1] Thus expenses may be modified or refused altogether where the successful party has, by his conduct, led to the institution of the action,[2] or by incurring excessive litigation has occasioned expense not reasonably necessary for vindicating or defending his right, as for instance where he institutes wholly unnecessary proceedings,[3] or omits to plead a defence on which he is ultimately successful until expense has been occasioned in discussing his other pleas.[4] Similarly, the expenses of a wholly unnecessary or incompetent proof may be awarded against the party who caused it, and that whether the fault be his own or that of the Sheriff.[5] In one case the successful party was allowed only half the expense of a proof in respect of its unnecessary length.[6] In another case of disputed succession, the Court allowed an unsuccessful reclaimer his expenses out of the fund, on the ground that difficulties in the way of construing the deed had been raised by the testator's want of clearness, and were of so intricate a character as to have made a reclaiming note justifiable.[7] Where there has been unnecessary procedure on both sides, the Court may award expenses to each party of the particular parts of the case in which he is successful.[8] As the matter of expenses is entirely within the discretion of the Court, it may, on equitable grounds, modify the expenses where an award will infer great hardship on the unsuccessful party.[9] Where the ground of judgment is not raised by the pleadings or is suggested by the Court, expenses may be modified,[10] or they may be awarded either to the successful or the unsuccessful party.[11] Expenses will also be modified or refused where a defender, though ultimately successful, has not stated his defence timeously, as, for example, where the action is thrown out on a preliminary plea which has remained unstated until the case has been heard upon the

[1] A. S. 10th April 1908.

[2] Manners *v.* Fairholm, 1872, 10 M. 520.

[3] Johnson *v.* Croall, 1844, 6 D. 410; Campbell *v.* Gordon, 1844, 6 D. 1097.

[4] Adam *v.* Watson, 1829, 7 S. 775.

[5] Dick & Stevenson *v.* Mackay, 1880, 7 R. 778.

[6] Ralston *v.* Cal. Ry. Co., 1878, 5 R. 671.

[7] Gibson's Trs. *v.* Wilson, 1899, 1 F. 1016.

[8] Buttery *v.* Inglis, 1877, 5 R. 58; Lowrie *v.* Frier, 1849, 12 D. 167.

[9] Trail *v.* Dangerfield, 1870, 8 M. 579.

[10] Bartsch *v.* Poole & Co., 1895, 23 R. 328.

[11] Arnott *v.* Burt, 1872, 11 M. 62; Fairbairn *v.* Sanderson, 1885, 13 R. 81.

merits.[1] And, as will be seen, expenses may be modified where the action has been raised in the wrong Court, as where it is appropriate to the Small Debt Court, and has been raised in the Ordinary Court.[2] Expenses may also be modified on the ground of the misconduct of the successful party.[3] In an action of reduction of a deed made by a client in favour of his law agent, the pursuer, who was the executrix of the client, made charges against the defender of a noxious character, which were wholly unfounded, and in granting decree of reduction the Court modified the pursuer's expenses to one-half.[4]

*Interlocutor modifying Expenses.*—A finding that expenses are to be modified must be contained in the interlocutor awarding them. The appropriate stage, therefore, for determining questions of expenses, such as whether they are to be modified or not, or whether, in the case of several defenders, the expenses of one or more sets of defences are to be allowed, is where the finding of expenses is made and the case is fresh in the recollection of the Court, and not at the diet for discussing objections to the Auditor's report.[5] The Court will, for instance, refuse to modify expenses after a remit has been made to the Auditor to tax.[6] And where parties desire a decree for expenses against others jointly and severally, they must move for it at the time they ask for expenses, and it is too late to raise the question for the first time on the Auditor's report.[7] So, where a party claims expenses on a special footing as between agent and client, he must make the motion at the time the expenses are awarded. It is too late to raise the question in objections to the Auditor's report.[8] The interlocutor sanctioning the modification may prescribe either that expenses shall be modified in a fixed ratio to the total amount incurred, as *e.g.* to one-half or two-thirds, or it may fix a definite sum as the amount of the expenses to be paid, and thus dispense with

[1] Steele *v.* M'Intosh, 1879, 7 R. 192; Ross *v.* Brims, 1878, 15 S.L.R. 438.

[2] *See infra*, Scale of Expenses.

[3] Ewart *v.* Brown, 1882, 10 R. 163; Collins *v.* Collins, 1882, 10 R. 250.

[4] Rigg's Exr. *v.* Urquhart, 1902, 10 S.L.T. 317 (O.H.); Shepherd *v.* Elliot, 1896, 23 R. 695.

[5] Murray *v.* Macfarlane's Trs., 1895, 23 R. 80; Electric Construction Co. *v.* Hurry & Young, 1897, 24 R. 525; *but see* Davidson's Trs. *v.* Simmons, 1896, 23 R. 1117.

[6] Mackellar *v.* M'Kellar, 1898, 25 R. 883.

[7] Warrand *v.* Watson and Others, 1907, S.C. 432.

[8] Aberchirder Mags. *v.* Banff D. C., 1906, 8 F. 571; *see* SS. Fulwood Ltd. *v.* Dumfries Harbour Comrs., 1907, S.C. 456, 735.

taxation. An interlocutor specifiying a particular sum either without qualification or as "modified" expenses is proper only in cases where the expense is small,[1] or when dealing with incidental steps of procedure.[2] Where a particular sum is awarded without qualification, it is regarded merely as a sum awarded to account, and the party in whose favour it is given may, if ultimately successful, recover under a general award of expenses any additional expenses with reference to the particular matter which the sum awarded to account may have proved insufficient to defray.[3] Where, however, an award of expenses relating to a particular proceeding or part of the case expressly names a particular sum as "modified expenses," the party in whose favour such an award is made, if ultimately found entitled to the general expenses of the cause, cannot obtain more than the amount so modified, even although the expenses of the particular proceeding or part of the cause exceed the modified expenses awarded.[4] The Court, on appeal, will be slow to interfere with a modification of expenses unless it considers a substantial mistake has been made.[5]

**Effect of Tender.**—The ordinary rule that expenses follow success is subject to modification where a tender or an extrajudicial offer is made. A tender is a judicial offer made by the defender to the pursuer after proceedings have commenced. An offer of settlement made either prior to litigation or subsequently is not, strictly speaking, a tender, though it may be important as showing that the defender has made a reasonable offer of compromise with a view to avoiding the expense of litigation.[6] The question of expenses does not arise until after the initial writ has been served on the defender. If, therefore, the defender makes payment of the sum demanded before service of the writ, he is not liable for any expense occasioned thereafter.[7] Similarly, if no previous demand have been made, the defender will not be liable in the expense of the initial proceedings if he makes payment immediately or within a reasonable time after

[1] Macfarlane *v.* Shankland, 1860, 22 D. 1500; Donaldson *v.* Thomson, 1873, 11 M. 347.

[2] Ireland *v.* N. B. Ry. Co., 1882, 10 R. 53; Craig *v.* Jex-Blake, 1871, 9 M. 973.

[3] Cameron *v.* Waterson & Co., 1861, 23 D. 535; Strangford *v.* Hurlet & Campsie Alum. Co., 1861, 23 D. 534.

[4] Byre's Trs. *v.* Gemmell, 1896, 4 S.L.T. 23 (O.H.); Wallace *v.* Henderson, 1876, 4 R. 264.

[5] Harvey *v.* Miller, 1845, 7 D. 604; Minto *v.* Kirkpatrick, 1837, 15 S. 1094.

[6] Penny *v.* Thomson, Aikman, & Co., 1893, 1 S.L.T. 140 (O.H.).

[7] Mintons *v.* Hawley, 1882, 20 S.L.R. 126.

service of the writ.[1] An extrajudicial offer made prior to litigation may be converted into a tender by being repeated on record. If made prior to litigation, but not repeated as a tender, or withdrawn, it will form an element in considering the question of the expenses, and if the pursuer ultimately obtains less than the amount of the offer, the Court will find neither party entitled to expenses.[2] But to be effectual it must be repeated on record, and when an extrajudicial offer made before service of the initial writ was repeated in the defences, but was only included at adjustment, the defender was held entitled to expenses only from the date of closing the record.[3] If made after litigation has commenced, though not in the form of a judicial tender, the general circumstances of the parties will be taken into consideration, as though it had been an offer made prior to the commencement of the action.[4] An extrajudicial offer, if less than the actual amount which the pursuer is subsequently awarded, will not in any way affect the defender's liability for expenses.[4] In any event the Court will attach no weight to an extrajudicial offer which is not accompanied by an offer of expenses, either expressly or by implication.[5] But where an extrajudicial offer, made before the action was raised, was repeated on record and subsequently accepted, it was held sufficient to entitle the defender to his expenses, even although it was not accompanied by an offer of expenses.[6] Parties to an action may settle it extrajudicially and effectually without the interposition of the Court's authority, as where the pursuer is induced, behind his agent's back, to accept an inadequate sum from the defender,[7] and the action may be effectually settled even though parties are at issue as to the exact meaning of the terms of compromise.[8]

A tender should contain an explicit offer of a specific sum, and to be effectual must contain an offer of expenses,[9] including the

[1] Mags. of Leith *v.* Lennon, 1881, 18 S.L.R. 313.

[2] Gunn *v.* Hunter, 1886, 13 R. 573; Critchley *v.* Campbell, 1884, 11 R. 475; Miller *v.* M'Phun, 1895, 22 R. 600.

[3] Bryden *v.* Devlin, 1899, 6 S.L.T. 374 (O.H.).

[4] Little *v.* Burns, 1881, 9 R. 138.

[5] Wick *v.* Wick, 1898, 1 F. 199; Low *v.* Spences, 1895, 3 S.L.T. 267 (O.H.).

[6] Gunn *v.* Hunter, *sup.*; *see* Mavor & Coulson *v.* Grierson, 1892, 19 R. 866.

[7] Gow *v.* Hendry, 1899, 2 F. 48; Welsh *v.* Cousin, 1899, 2 F. 277.

[8] Christie *v.* Fife Coal Co., 1899, 2 F. 192.

[9] Addison *v.* Kellock, 1906, 14 S.L.T. 410 (O.H.); Aitchison *v.* Steven, 1864, 3 M. 81.

expense of considering and accepting the tender and of taking the case out of Court. Thus, where a pursuer refused a tender of £100, recovered £300 and was awarded expenses, he was held entitled to charge against the defender fees to counsel for a consultation at which the tender was considered, and in preparation for which they had read the precognition in the case.[1] It may be embodied in the defences or be contained in a separate minute, and must be unambiguous in its terms and free from qualifications.[2] A tender or an extrajudicial offer which is made "without prejudice" is not conditional. A tender will generally relieve the defender of his liability to expenses subsequent to its date, if the amount eventually awarded to the pursuer is less than or equal to the amount tendered.[3] If, however, the amount tendered is less than the actual award, its offer will not in general affect the defender's liability for expenses,[4] though in such a case the Court may find neither party entitled to expenses, especially if the amount tendered with interest is only slightly less than the amount recovered.[5] A tender must be accepted without unreasonable delay, though a reasonable time must be afforded to the pursuer to consider its acceptance or rejection.[6] If the tender is not accepted, and subsequently the pursuer is found entitled to expenses, he will also be entitled to the expense of considering the tender he has declined.[7] If the tender be not timeously accepted, but is accepted ultimately, the pursuer is entitled to his expenses up to and including the date of the tender, and the defender to his expenses subsequent to that date. Whether a tender has been accepted timeously or not depends upon the circumstances, to be determined in the discretion of the Court. Thus, where a tender made on 21st June was accepted on 26th June, the Court found the pursuer entitled to expenses up till and including 24th June, but found the defender entitled to expenses subsequent to that

[1] Irvin *v.* Fairfield Shipbuilding Co., 1899, 1 F. 595; Nixon *v.* N. B. Rly. Co., 1882, 20 S.L.R. 160.

[2] Low *v.* Spences, *sup.*; Thomson *v.* Dailly, 1897, 24 R. 1173; Reid & Co. *v.* Firth & Stott, 1886, 23 S.L.R. 845; Tobiasen *v.* Isle of Man S.S. Co., *infra.*

[3] Mitchells *v.* Nicol, 1890, 17 R. 765; Brodie *v.* MacGregor, 1901, 4 F. 93.

[4] Webster *v.* Alexander, 1859, 21 D. 1214, *per* L.-J.C. Inglis; Cutlar *v.* M'Leod's Trs., 1876, 13 S.L.R. 308.

[5] Little *v.* Burns, *sup.*; Greig *v.* Balfour, 1898, 25 R. 794.

[6] Edin. & Glas. Rly. Co. *v.* Shaw's Exr., 1863, 2 M. 142.

[7] M'Dougall *v.* Cal. Rly. Co., 1878, 5 R. 1011; Irvin *v.* Fairfield Shipbuilding Co., *sup.*

date.[1] Silence after a reasonable interval will be interpreted as a refusal.[2] In actions of damages for defamation, a tender, to be effectual, must be accompanied by an apology and a withdrawal of the slanderous words.[3] The retractation must be such as to clear the pursuer's character of the charges made.[4] If the tender of apology be made at such a stage of the case as to be equivalent to the verdict of the jury, the pursuer on accepting it will be entitled to expenses.[5] A hypothetical apology is a good one, as, for instance, "If I said these words I apologise," or "If the words imputed to me can bear the meaning ascribed to them, then I withdraw them"[6]; and accordingly, if the defender in an action of damages for slander makes such an apology and tenders an amount which exceeds the sum ultimately awarded to the pursuer, he will be entitled to his expenses from the date of the tender. Where a defender in his defences expressed regret, offered an apology, and tendered a guinea and expenses, the jury ultimately found for the pursuer and assessed the damages at a farthing, and the Court awarded the defender his expenses.[7] The rule as to retractation applies only to actions of damages for slander, not to actions of damages, as, *e.g.*, for breach of promise of marriage in which defamatory statements are made on record.[8] An admission in the defences that part of the sum sued for is admittedly due, is equivalent to a tender of the amount admitted.[9] Thus, in counter actions of damages owing to a collision, one of the parties offered to settle on the basis that both ships were to blame, and it was held, on that party obtaining an award of £300, that his offer constituted a tender.[10]

**Expenses as affecting Various Parties.**—The Court is absolute master on the question of expenses, and if it turn out that the expense of the litigation has been caused by a party before the Court—whether he is named in the conclusions of the

[1] M'Laughlin *v.* Glas. Tram. Co., 1897, 24 R. 992.

[2] Macrae *v.* Edin. Street Tram. Co., 1885, 13 R. 265.

[3] Faulks *v.* Park, 1854, 17 D. 247; Mitchell *v.* Nicol, 1890, 17 R. 765; Hunter *v.* Russell, 1901, 3 F. 596.

[4] Faulks *v.* Park, *sup.*

[5] Hunter *v.* Russell, 1901, 3 F. 596; Macrae *v.* Edin. Street Tram. Co., 1885, *sup.*

[6] Malcolm *v.* Moore, 1901, 4 F. 23, 369.

[7] Sproll *v.* Walker, 1899, 2 F. 73.

[8] Brodie *v.* M'Gregor, 1901, 4 F 93.

[9] Ramsay's Trs. *v.* Soutar, 1864, 2 M. 892, *per* Ld. J.-C. Inglis.

[10] Tobiasen *v.* Isle of Man S.S. Co. 1893, 1 S.L.T. 275.

summons or not—the Court has power in its discretion to award expenses against such party, so far as they have been occasioned by him.[1]

*Several Defenders.*—So much are expenses a matter within the discretion of the Court, that they may be awarded to one defender against another.[2] Defenders having a common defence will not each be allowed the expense of a separate defence, though each may be entitled to the expenses of his defence up to the date of the closing of the record, after which the expenses of one common defence only will be allowed.[3] Thus, where in an action against the members of a club, twelve sets of defences were lodged, all involving substantially the same grounds of defence, it was held, on the dismissal of the action, that the defenders were entitled to the expenses of only one set of defences.[4] Where, however, the several defenders have separate or conflicting interests, they are entitled to maintain separate defences, and to recover from the pursuer, in the event of their success, the expenses attendant on lodging and maintaining such separate defences. If, however, in the conduct of such separate defences only one agent be employed, such agent will not be entitled to the expense attendant on stating or maintaining more than once a ground of defence which is common to all the defenders or which is maintained for the common good.[5] Where three defenders employed one agent and only one defender was successful, he was found entitled to only one-third of the agent's expenses in so far as incurred on behalf of the three defenders in common.[6] But where separate actions against independent defenders are conjoined, and one defender obtains absolvitor, the unsuccessful defender will be found liable in the expenses both of the pursuer and of the successful defender.[7]

[1] Mitchell *v.* Baird, 1902, 39 S.L.R. 681, *per* Ld. Kinnear; *cf.* Walker *v.* Walker, 1903, 5 F. 320.

[2] Rooney *v.* Cormack, 1895, 23 R. 11; Mackintosh *v.* Galbraith & Arthur, 1900, 3 F. 66.

[3] Anderson *v.* M'Cracken & Others, 1900, 2 F. 780; Edin. & Glas. Rly. Co. *v.* Arthur, 1858, 20 D. 667; Stott *v.* Fender, 1878, 5 R. 1104; Duncan *v.* Salmond, 1874, 1 R. 839; Burrell *v.* Simpson, 1877, 4 R. 1133.

[4] Cockburn *v.* The City Club, 1905, 12 S.L.T. 678 (O.H.).

[5] Greenhill *v.* Gladstone, 1861, 23 D. 1006.

[6] Arthur *v.* Lindsay, 1895, 22 R. 904.

[7] Straiton Estate Co. *v.* Stephens, 1880, 8 R. 299; Simpson *v.* Miles & Auld, 1883, 10 R. 928; Rooney *v.* Cormack, 1895, 23 R. 11; *but see* Palmer *v.* Russell, 1871, 10 M. 185.

So, generally, where one of two defenders is assoilzied, the whole expenses of the cause may be awarded against the unsucessful defender, though the rule is not absolute.[1] Even where the defenders state pleas on record which may ultimately conflict, the rule is that the expense of only one set of defences will be allowed up to the time when the conflict actually emerges.[2] In one case, two defenders in two actions of damages for slander were represented throughout by the same counsel and agent, and the trials were taken together. In the result, one defender was assoilzied with expenses, and decree with expenses was pronounced against the other, and it was held that the pursuer was entitled to his full expenses as against the unsuccessful defender, and that the successful defender was entitled to his full expenses down to the date of the adjustment of issues, and to one-half of the expenses of the joint defence from that date.[3] In one case two defenders conducted a joint defence: one of them compromised with the pursuer, while the other insisted in the action, and was ultimately successful on appeal, and he was held entitled to only one-half of the joint expenses.[4] Where a pursuer at the instance of a defender calls a new party as a defender, and is unsuccessful as against him, the original defender will be liable for the expenses occasioned to such new defender.[5] Thus, where the pursuer of an action of damages grounded on negligence, made a claim against a certain person, who repudiated liability and threw the blame upon another, it was held, on the pursuer suing both defenders jointly and severally, and obtaining a verdict against the original defender only, that the second defender was entitled to his expenses from the original defender.[6] Joint defenders are liable *singuli in solidum* only if the decree is awarded against them jointly and severally. If the pursuer of an action desires to get an award of expenses against several defenders jointly and severally, he must move for decree in these terms at the time he asks for expenses, and it is too late to raise the question for the first time on a motion to approve of the Auditor's report.[7] But where defenders are found

[1] Canada Copper Co.'s Liqr. *v.* Peddie, 1877, 5 R. 393.

[2] *Ibid.*

[3] Crawford *v.* Adams & Dunlop, 1900, 3 F. 296; *see* Karrman *v.* Crosbie, 1898, 25 R. 931.

[4] Robertson *v.* Stewart, 1875, 2 R. 970.

[5] Brownlie *v.* Tennent, 1855, 17 D. 422.

[6] Morrison *v.* Waters & Co., 1906, 8 F. 867.

[7] Warrand *v.* Watson, 1907, S.C. 432.

liable in expenses jointly and severally, any one of them, on offering to pay the expenses in full, is entitled to an assignation of the decree from the pursuer so as to enable him to work out his relief.[1] Where, in the case of several defenders, the Court finds them entitled to expenses generally, it is intended that the question is reserved for consideration after taxation.[2]

*Joint Pursuers* maintaining the same pleas are entitled to only one set of expenses.[3] One of two pursuers conducting a case jointly is entitled, on obtaining judgment in his favour, to his whole separate expenses and one-half of the joint expenses, that is, to such expenses as he will be liable to pay his agent.[4] Where expenses are given against joint pursuers, each is liable for the full amount, jointly and severally, though a pursuer who pays more than his share has a right of relief against the others.[5] A joint pursuer of an action will be liable for expenses if unsuccessful, even though his taking part in the action has occasioned no additional expense.[6]

**Party who Consents or Sists Himself.**—A person who induces a party to undertake a litigation, or who consents to such litigation being initiated or insisted in, may have the expenses occasioned by his conduct or consent awarded against him. Simple concurrence involves liability for expenses.[7] Any one who sists himself as a party to an action, as, for example, a trustee in bankruptcy, is liable not only in the subsequent expenses of the action, but for those caused or due by the party in whose interest he sists himself.[8] A husband who consents to or concurs, or who actively promotes or takes a personal interest in, an action by his wife relating to her separate estate, as where she sues for the aliment of an illegitimate child with his consent and concurrence,[9] may be found liable, jointly and severally, or severally, in the expenses of the action,

[1] Mackie *v.* Mackie, 1896, 4 S.L.T. 294 (O.H.).

[2] Cameron *v.* French, 1893, 1 S.L.T. 259 (O.H.).

[3] Stott *v.* Fender, 1878, 5 R. 1104; Bell *v.* Goodall, 1883, 10 R. 905; *but see* Welsh *v.* Eastern Cemetery Co., 1894, 21 R. 769.

[4] Robertson *v.* Stewart, 1875, 2 R. 970.

[5] Logan *v.* Gibson, 1852, 15 D. 94.

[6] Watson's Trs. *v.* Glasgow Feuing and Bldg. Co. Ltd., 1887, 14 R. 718.

[7] Alexander *v.* Philips, 1856, 18 D. 617.

[8] Ellis *v.* Ellis, 1870, 8 M. 805; Wallace *v.* Eglinton, 1836, 14 S. 599; *see* Wallace on Bankruptcy, p. 140.

[9] Lindsay *v.* Kerr, 1891, 18 R. 365.

in the event of its proving unsuccessful.[1] The concurrence must, however, be clear and explicit.[2] The father of a minor or a pupil who takes part in a litigation for his son's interest may similarly be found liable in expenses, his position as tutor to his son being that of a voluntary trustee, rather than that of a curator *ad litem*,[3] as regards whom there can be no decree for expenses awarded against him.[4] Defenders called to an action in respect of positions which they occupy *ex officio*, will in general be awarded their expenses.[5] Where a defender who was called by mistake did not take steps to inform the pursuer of his mistake, but lodged defences in the ordinary way, he was, on the pursuer enrolling and consenting to decree of absolvitor, found entitled to expenses modified at the sum of two guineas.[6]

*Dominus litus.*—A person who has a direct interest in the suit, and through that interest exercises a dominating control of the proceedings,[7] from the issue of which he anticipates some ultimate benefit,[8] may, if the actual litigant be merely his agent,[9] have expenses awarded against him; or the nominal pursuer may be required to find caution for expenses,[10] or the party with the real interest may be required to sist himself as a party to the action.[11] Thus, where an aunt authorised an action by pupil children against their father, the pleadings clearly disclosing her connection with the case, a curator *ad litem* to the children was appointed, and on the defender being assoilzied the Court ordained the aunt as *dominus litis* to pay the expenses of the curator *ad litem*.[12] Where a workman sued his employers for damages for personal injury, the defence to the action being conducted and controlled by an insurance company with which the employer was insured, it was held, on the

[1] Fraser *v.* Cameron, 1892, 19 R. 564; Kerr *v.* Malcolm, 1906, 14 S.L.T. 358 (O.H.); M'Gowan *v.* Cramb, 1898, 25 R. 634; Maxwell *v.* Young, 1901, 3 F. 638; Schmidt *v.* Cal. Rly. Co., 1903, 5 F. 648; Picken *v.* Cal. Rly. Co., 1901, 4 F. 39.

[2] Whitehead *v.* Blaik, 1893, 20 R. 1045.

[3] White *v.* Steel, 1894, 21 R. 649; Wilkinson *v.* Kinneil Cannel & Coke Co., 1897, 24 R. 1001.

[4] Fraser *v.* Pattie, 1847, 9 D. 903; White *v.* Steel, *sup.*

[5] Macdougall *v.* Miller, 1901, 8 S.L.T. 229 (O.H.).

[6] Brown *v.* Milliken, 1901, 9 S.L.T. 310 (O.H.).

[7] Mathieson *v.* Thomson, 1853, 16 D. 19.

[8] Potter *v.* Hamilton, 1870, 8 M. 1064.

[9] Fraser *v.* Malloch, 1896, 23 R. 619 (O.H.); Docherty *v.* Glasgow Tram. Co., 1895, 2 S.L.T. 406 (O.H.); Armstrong, 1895, 2 S.L.T. 525 (O.H.).

[10] Jenkins *v.* Robertson, 1869, 7 M. 739.

[11] Fraser *v.* Dunbar, 1839, 1 D. 882.

[12] Walker *v.* Walker, 1903, 5 F. 320; Smith *v.* Smith, 1900, 8 S.L.T. 180 (O.H.).

pursuer obtaining decree for damages and expenses, and the nominal defenders having become insolvent, that he was entitled to raise and obtain decree in an action against the insurance company as *dominus litis* for payment of his expenses.[1] A law agent who takes an assignation of his client's claim and right of action in security of a debt, is not thereby constituted the *dominus litis* of the action which he raises in right of his assignation.[2] The mere fact that a third party advances funds to carry on the litigation does not make him the *dominus litus* if the party to the suit has a real and substantial interest in it.[3]

**Award of Interim Expenses.**—An award of the expense caused by any particular step in procedure may be made at the time when such expense is occasioned, if such a course is deemed advisable or necessary. Thus the expenses occasioned by amendments, either of the initial writ or of the pleadings, by delays or postponements, by the lodging of improper or incompetent pleadings, or the adoption of incompetent or improper procedure, or by the absence of a party at a diet when his presence is necessary or has been ordered by the Sheriff, may be awarded against the party responsible for it. If both parties fail to appear at any diet in the cause, the Sheriff must dismiss the action, unless sufficient reason to the contrary be apparent,[4] and no expenses will be awarded to either side unless a reasonable excuse is forthcoming.[5] Under the rules regulating procedure prior to the Act of 1907, the Sheriff might competently award expenses where he sustained the dilatory defences or any of them, but it was thought that where he repelled such defences the language of the regulations, by inference, at least, precluded him from making an award of interim expenses.[6] There does not, however, appear to be any valid reason, under the provisions of the Act of 1907, why such an award should not be at least competent. In the Court of Session, when proof is allowed, the expenses of a discussion in the Procedure Roll are usually reserved, while if the action is dismissed on a preliminary plea the Lord Ordinary determines the question of the expenses. If, on the other hand, such pleas are repelled, no expenses are, as a rule, awarded, unless

[1] Kerr *v.* Employers' Liab. Ass. Co., 1899, 2 F. 17.

[2] Fraser *v.* Dunbar, 1839, 1 D. 882; Walker *v.* Wedderspoon, 1843, 2 Bell's Ap. 57.

[3] Waddel *v.* Hope, 1843, 6 D. 160.

[4] Act, Rule 56. *See* Chap. XXI.

[5] Duff *v.* Steuart, 1881, 9 R. 17.

[6] Dove Wilson, 4th ed., p. 189.

the defender gives notice of his intention to reclaim. An award of interim expenses is regarded as a payment to account.[1]

**Reservation of Expenses.**—It is always competent for the Court to reserve all questions as to interim expenses for disposal along with the general expenses of the cause on the merits, in which case they may be decerned for in a subsequent interlocutor.[2] The expense of incidental procedure in the cause is usually reserved until the final interlocutor disposing of the merits.[3] Where expenses have been so reserved, a general finding of expenses carries with it the reserved expenses.[4] Thus, where a party is unsuccessful on a preliminary plea, but is ultimately successful on the merits, an award of expenses will include the expenses of the discussion on the preliminary plea, if the expenses of that discussion have been at the time reserved.[5]

**Payment of Expenses condition precedent to further Procedure.**—Whether payment of the interim expenses awarded is made a condition precedent to further procedure is a matter entirely within the discretion of the Court, to be determined in accordance with equitable considerations in the circumstances of each particular case. There is no inflexible rule that when a party has lost even a material part of the case, and has been found liable in expenses, the payment of such expenses is a condition precedent to his proceeding with the case.[6] It is, however, usually a condition precedent to a reduction of a decree in absence that the pursuer shall pay the expenses of the original action, and a pursuer will be allowed to abandon a case only on condition that he pays the defender's expenses.[7] Expenses must also as a rule be paid before a party case be reponed against a decree in absence. Thus, where a decree by default was pronounced in the Sheriff Court against a pursuer, he appealed to the Court of Session. The Court recalled the interlocutor *in hoc statu*, and allowed him as a condition of further procedure to make payment of the whole expenses, intimating that if

[1] Cameron *v.* Waterson & Co., 1861, 23 D. 535.

[2] Bannatyne's Trs. *v.* Cunningham, 1872, 10 M. 317.

[3] California Redwood Co. *v.* Merch. Bk. of London, 1886, 13 R. 1202.

[4] Cal. Rly. Co. *v.* Chisholm, 1889, 16 R. 622; Gardiner *v.* Victoria Estates Co., 1885, 13 R. 80; *but see* Parnell *v.* Walter, 1890, 17 R. 552.

[5] Graham *v.* Pollok, 1850, 12 D. 978; Tennant *v.* Fyfe, 1874, 11 S.L.R. 418.

[6] Byre's Trs. *v.* Gemmell, 1896, 4 S.L.T. 23 (O.H.).

[7] Hare *v.* Stein, 1882, 9 R. 910.

he did so they would remit the case back to the Sheriff, but if he did not the defender would be assoilzied of new.[1] Where an alternative conclusion for damages is dismissed with expenses, the pursuer may be required to pay such expenses before being allowed to proceed with the other conclusions of the action.[2] Expenses awarded in an accessory action may be treated as if they had been awarded in the principal action and their payment made a condition of allowing the action to proceed.[3] Thus, where a pursuer, having been unsuccessful in an action in the Sheriff Court, and found liable in expenses, raised an action in the Court of Session with identical conclusions, he was not allowed to proceed till he had paid the expenses of the action in the Sheriff Court.[4] Similarly, when an action of damages for slander was dismissed as irrelevant and the pursuer found liable in expenses, he was not allowed to proceed with a second action based on the same alleged slander until he had paid the expenses of the first.[5] Where an action of reduction failed, payment of the expenses incurred was held to be necessary before an action of count, reckoning, and payment relating to the same subject could be proceeded with.[6] When, however, the subject-matter of the two actions differs, or when the actions are neither accessory or ancillary to each other, as, *e.g.*, where the first action is on contract, and the second on slander contained in letters breaking off the contract. Payment of the expenses incurred in the first will not be required as a condition of being allowed to proceed with the second.[7] As neither protestation for not insisting in the action nor decree in absence are final, parties may be restored against both on payment of expenses, the payment of such expenses being a condition precedent.[8]

**Expenses on the Merits.**—The general rule is that expenses are not decided until the cause is finally decided on its merits. Where a case is compromised without any provision having been made as to expenses, the Court will not thereafter consider the matter of expenses.[9] Where, therefore, parties settle or compromise

[1] M'Carthy *v.* Emery, 1897, 24 R. 610.
[2] Wallace *v.* Henderson, 1876, 4 R. 264.
[3] Irvine *v.* Kinloch, 1885, 13 R. 172; Nixon *v.* Houston, 1898, 1 F. 78.
[4] Wilson *v.* Crighton, 1898, 5 S.L.T. 443 (O.H.).
[5] M'Murchy *v.* M'Lullish, 1889, 16 R. 678.
[6] Irvine *v.* Kinloch, 1885, 13 R. 172.
[7] Steuart *v.* Moss, 1886, 13 R. 572.
[8] *See supra*, pp. 134, 142.
[9] Dobie *v.* Macfarlane, 1856, 18 D. 1043.

an action extrajudicially, they should take care to settle the matter of expenses, or to see that in the agreement or discharge their consideration is specially reserved. The interlocutor disposing of the merits must either dispose of the question of the expenses expressly, or it must reserve them for future decision, in which case they may be decerned for subsequently.[1] But in contested causes, if the interlocutor disposing of the case is silent on the question of expenses and the decree is extracted, the Court will be held to have intended that neither party should be awarded expenses, and they cannot be subsequently awarded, even if the initial writ contain a crave for expenses and decree be granted in accordance with its prayer.[2] Before the decree is extracted, an omission to deal with the question of expenses may be corrected by the Sheriff, as in the case of any other error.[3] An award of expenses means expenses as between party and party, unless the interlocutor specially provides that they shall be taxed as between agent and client.[4] A decree for expenses includes the expense of extract,[5] but it does not cover the expense of arresting on the dependence,[6] nor of a minute of restriction of the crave in the initial writ.[7] Expenses allowed in any action, whether in absence or *in foro*, must, unless modified at a fixed amount, be taxed before decree is granted for them.[8] A decree for expenses may be extracted after seven days.[9]

**Award of Small Debt Expenses.**—Where the demand made does not exceed the value which may be competently concluded for in the Small Debt Court, *i.e.* £20, Small Debt expenses only can be allowed, unless the Sheriff sees fit to appoint otherwise.[10] The matter is one entirely in the discretion of the Sheriff, and if he is of opinion that the action, though appropriate to the Small Debt Court, has been properly raised in the Ordinary Court, he may allow expenses on the ordinary scale. Where the principal amount actually decerned

[1] Bannatyne's Trs. *v.* Cunningham, 1872, 10 M. 317; Wilson's Trs. *v.* Wilson's Factor, 1868, 7 M. 457.

[2] Young *v.* Sinclair, 1796, M. 10053; Western Bank *v.* Buchanan, 1865, 4 M. 97; M'Dowall *v.* Stewart, 1871, 10 M. 193; Drummond *v.* Hunter, 1869, 8 M. 277.

[3] *See ante*, p. 192.

[4] Fletcher's Trs. *v.* Fletcher, 1888, 15 R. 862.

[5] Act, Rule 98.

[6] Symington *v.* Symington, 1874, 1 R. 1007; Roy *v.* Turner, 1891, 18 R. 717; Black *v.* Jehanjir Framjee & Co., 1887, 14 R. 678.

[7] Fimister *v.* Milne, 1860, 22 D. 1100.

[8] Act, Rule 99.

[9] Act, Rule 98.

[10] A. S. 10th April 1908, s. 2.

for does not exceed the sum of £20, the Sheriff in his discretion may allow Small Debt expenses only.[1]

**Award in Cases of *Pluris petitio*.**—Where the amount sued for is out of proportion to the amount actually recovered, the Sheriff may, in his discretion, modify or even refuse expenses to the successful pursuer.[2] Where the pursuer of an action of damages, other than for defamation of character, appeals from the Sheriff Court to the Court of Session for jury trial, if he is awarded less than £50 he will be found entitled to only one-half of his taxed expenses, unless the presiding Judge certifies that he is entitled to a larger amount, which, however, in any event must not exceed two-thirds.[3] In a case transmitted to the Court of Session for jury trial under the Employers' Liability Act and the Sheriff Court Act of 1877, where the pursuer obtained a small award, he was held entitled only to Sheriff Court expenses on the higher scale, with an allowance for the employment of counsel.[4]

**Employment of Counsel.**—The employment of counsel may be sanctioned in the Sheriff Court, but the expense occasioned is allowed as part of the expenses of the cause only when such employment is sanctioned at the time or subsequently authorised by the Sheriff.[5] Sanction may be given any time before taxation of the account,[6] though in one case a certificate sanctioning the employment produced after taxation was held good.[7] Where the employment of counsel is not authorised or sanctioned by the Sheriff, the Court on appeal will not readily interfere.[8]

## II. Taxation

The expenses allowed in any action, whether in absence or *in foro*, unless modified at a fixed amount, must be taxed before decree is granted for them.[9] The fact that the principal decree has been extracted does not, however, preclude the successful party from

[1] A. S. 10th April 1908, s. 2.

[2] *See supra*, Modification of Expenses.

[3] A. S. 20th March 1907; Lafferty *v.* Cal. Rly. Co., 1907, 45 S.L.R. 25 (O.H.); *see* Geddes *v.* M'Lellan, 10th June 1908, 16 S.L.T. 122.

[4] Branningan *v.* Munro, 1906, 14 S.L.T. 333 (O.H.).

[5] Wood's Trs. *v.* Wood, 1900, 2 F. 870.

[6] Purvis *v.* Dowie, 1869, 7 M. 764.

[7] M'Kerchar *v.* M'Quarrie, 1887, 14 R. 1038.

[8] Mackenzie *v.* Blakeley, 1879, 7 R. 51.

[9] Act, Rule 99.

afterwards obtaining taxation of his account of expenses and decree therefor.[1] The account is taxed by the Auditor of Court in presence of the parties or their agents. The party found entitled to expenses lodges a copy of his account in process, and serves another upon the opposite party, with an intimation of the diet fixed by the Auditor for taxation. No special length of notice is requisite, but it must be reasonable. The general rules affecting taxation are embodied in the Act of Sederunt of 1908, a copy of which will be found in the Appendix.

**Modes of Taxation.**—Expenses of litigation are taxed differently, according as they are allowed as between party and party or as between agent and client, but the table of fees annexed to the Act of Sederunt of 10th April 1908 regulates the taxation of accounts under both modes, subject to this distinction, that where, as between party and party, general charges of limited amount (such as "taking instructions" at the beginning of a case, "instructions for precognition" and "process fee") only are stated, the agent may, as against his client, substitute for these general fees detailed charges for all necessary business in connection with the case, the rates of charge being regulated by the Table of Fees. Where expenses are allowed as between agent and client, the Auditor in taxing the account allows all expenses reasonably incurred by the agent for the protection of his client's interest in the suit, even though such expenses cannot be recovered from the opposite party. The principle of taxation as between agent and client is not, however, necessarily the same as where the client has to pay his agent, and the Auditor is entitled to deduct unnecessary and excessive charges which might be allowed as against the client.[2] But he will allow any expense of an unusual or extraordinary character, provided the agent can show that his client has specially authorised the incurring of such expense. Where, however, expenses are allowed as between party and party (and all findings of expenses generally mean that the account shall be so taxed, unless it is specially provided that the taxation shall be as between agent and client[3]), the expenses allowed by the Auditor are limited to the proper

[1] Crichton Bros. *v.* Crichton, 1901, 4 F. 241.

[2] Walker *v.* Waterlow, 1869, 7 M. 751; Hood *v.* Gordon, 1896, 23 R. 675.

[3] Fletcher's Trs. *v.* Fletcher, 1888, 15 R. 862.

expenses of process, without any allowance (beyond that specified in the table of fees) for preliminary investigations, subject to the proviso that the expense of taking precognitions, preparing plans, analyses, reports, and the like, may be allowed where eventually an interlocutor allowing a proof is pronounced, even though they are taken or made before the raising of the action or the preparation of the defence, or before proof is allowed, and although the case does not proceed to trial or proof. Thus, where a party was awarded expenses up to a date antecedent to the adjustment of issues for trial, it was held that he could not include as against the other party the expense of precognitions although made before that date.[1] In taxing accounts as between party and party, such expenses only are allowed as are necessary for conducting the litigation in a proper manner, with a due regard to economy. If, for example, a party chooses to pay or authorise higher fees than those allowed by the table, he is at liberty to do so, but the extra expense thereby occasioned will not be allowed as a charge against his opponent.

*Agent and Client.*—In certain cases, expenses, contrary to the general rule, are usually awarded as between agent and client. Thus, in the case of trustees litigating with reference to the trust estate, expenses are usually awarded out of the trust estate, and taxed as between agent and client.[2] In one case, where one of a body of trustees petitioned for the removal of the others and the appointment of a judicial factor, the petition being resisted by the respondents, it was held that the petitioner was entitled to his expenses as between agent and client, and that they must be paid by the respondents personally without recourse against the trust estate.[3] Where, again, a person with a comparatively small interest is selected and put forward to test a question of general importance, he may be found entitled to his expenses as between agent and client.[4] Expenses are also generally awarded as between agent and client in petitions for winding up limited liability companies.[5] And in consistorial causes expenses are usually awarded to the wife if successful, as between agent and client.[6] But in actions by a wife

[1] Malcolm *v.* Moore, 1901, 4 F. 369.

[2] Peat's Trs. *v.* Peat, 1901, 38 S.L.R. 269.

[3] Neilson *v.* Stewart's Trs., 1905, 42 S.L.R. 434.

[4] Insurance Trust, etc., Liqurs. *v.* Inches, 1905, 13 S.L.T. 556 (O.H.).

[5] M'Gregor *v.* Ballachulish Slate Quarries Co. Ltd., 1908, S.C. 1.

[6] Grant *v.* Grant, 1906 (H.L.) 43 S.L.R. 109.

for custody of the children, expenses are given as between party and party if the wife be living apart from her husband without judicial warrant, and she is possessed of separate estate.[1]

*Public Authorities.* — Where an action, prosecution, or other proceeding is raised or taken against any person for any act done in pursuance, execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, a judgment in favour of the defender necessarily carries costs as between agent and client,[2] no discretion being allowed to the Court in cases to which the provisions of the Act apply where the defender is actually awarded expenses.[3] But the interlocutor awarding the expenses must expressly bear that they are so awarded, or otherwise the ordinary rule will apply.[4] The provisions of the Act do not, however, interfere with the Court's discretion in awarding expenses.[5] The Act has been held to apply, though founded on only after the closing of the record.[6] But the motion must be made before the case is appealed.[7] The provisions of the Act, it has been held, do not apply where the action is absolutely excluded by another Statute. Thus, where a pursuer raised an action of damages for slander against the magistrates and officials of a burgh, the slanderous matter complained of being contained in a report by the committee of magistrates, it was held that as such an action is excluded by the terms of section 60 of the Commissioner's Clauses Act, 1847, which Act was incorporated in the Police Act of the Burgh referred to, the provisions of the Public Authorities Protection Act did not apply, and the defender was found entitled to expenses only as between party and party.[8] Nor does the Act protect magistrates from the consequences of breaches of contract made by them as trustees administering public property.[9] The protection of the Act extends, however, to Volunteers and their

[1] Mackellar *v.* Mackellar, 1898, 25 R. 883; A. B. *v.* C. D., 1906, 8 F. 973.

[2] The Public Authorities Protection Act, 1893, s. 1.

[3] Montgomerie & Co. Ld. *v.* Burgh of Haddington, 1906, 14 S.L.T. 183 (O.H.).

[4] Aberchirder Mags. *v.* Banff D. C., 1906, 8 F. 571.

[5] Aird *v.* Tarbert Sch. Bd., 1907, S.C. 305.

[6] Christie *v.* Glasgow Corporn., 1899, 36 S.L.R. 694.

[7] Sommerville & Son *v.* Edin. & Dist. Water Trs., 1907, S.C. 355.

[8] Davidson *v.* Anderson, 1905, 13 S.L.T. 298 (O.H.).

[9] M'Phie *v.* Greenock Mags., 1904, 7 F. 246.

officers while acting in the discharge of their duty.[1] It has been doubted whether the Act applies where a public authority takes decree by consent.[2] Where a local authority obtains an interlocutory judgment in its favour, and desires to preserve its right to claim the benefit of the Act in regard to expenses, it ought to have the question of expenses reserved. But it may elect to have the question at once disposed of. If, however, that course is followed and the expenses are found due between party and party, as at that stage they must necessarily be, it would appear that the local authority cannot thereafter at the end of the day ask that the same expenses already taxed as between party and party should be retaxed as between agent and client.[3]

**General Rules.**—In the Ordinary Sheriff Court, with the exceptions to be noted, there are two scales of taxation,—the first for causes where the amount of the principal (exclusive of interest due[4]) does not exceed £50, and the second for causes exceeding that amount. In all cases, however, the Sheriff may appoint that expenses shall be subject to modification. (1) In the ordinary case the scale of taxation is regulated by the principal sum concluded for, but in all cases it is competent for the Sheriff to direct that the expenses shall be taxed in accordance with the scale applicable to the actual amount decerned for. (2) In cases where the principal sum concluded for does not exceed £50, the Sheriff may direct that expenses shall be taxed on the higher scale, if he is of opinion that such sum does not truly represent the nature and importance of the cause. (3) In actions of damages the scale of taxation as regards the pursuer's account between party and party is regulated by the sum decerned for, unless the Sheriff otherwise directs. (4) In ordinary removings and ejections the scale is regulated according to the amount of the yearly rent; if the rent set forth does not exceed £50, the expenses are taxed according to Scale I. (5) Where the demand made does not exceed the value which may be competently concluded for in the Small Debt Court, the expenses applicable to an action in that Court only are allowed, unless the Sheriff sees fit to order otherwise. (6) Where the actual amount

[1] Wilson *v.* 1st Edin., etc., Arty. Vols., 1904, 7 F. 168.

[2] Aird *v.* Tarbert Sch. Board, *sup.*

[3] Walsh *v.* Mags. of Pollokshaws, 1907, 14 S.L.T. 845 (O.H. *per* Ld. Guthrie).

[4] The A. S. of 1878 specified "principal with past interest."

decerned for does not exceed the amount for which an action in the Small Debt Court would be competent, *i.e.* £20, Small Debt expenses only may, in the Sheriff's discretion, be allowed. (7) In all actions where the pecuniary amount or value of the question in dispute cannot be ascertained from the process, the Sheriff must determine according to which scale the amount must be taxed. Whether an account is to be taxed according to the higher or the lower scale is a matter for the Court to decide and not for the Auditor, and if the interlocutor awarding expenses is silent with regard to the particular scale of taxation, the Auditor has no discretion, but must tax the account on the appropriate scale. Thus, where in an action which originally concluded for specific performance and damages, but from which the conclusion for specific performance was allowed of consent to drop, the pursuer was awarded a sum of £12 as damages with expenses, the Auditor was held bound to tax the account on the lower scale, on the ground that the action was *de facto* one for damages only, and that the interlocutor awarding expenses was silent with regard to the scale on which expenses should be taxed.[1]

In order that the expenses of litigation may be kept within proper and reasonable limits, the Auditor, in taxing accounts as between party and party, may allow only such expenses as are absolutely necessary for conducting the litigation in a proper manner, with a due regard to economy. The Sheriff may expressly disallow all charges for papers or parts of papers, or of particular procedure or agency which in his opinion have been irregular or unnecessary, and the Auditor will of course give effect to such directions. But where, on the taxation of the account of a party who has been found entitled to expenses generally, it appears that there is any particular part of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he will not be allowed the expenses of such proceedings. It is the duty of the Auditor to consider whether there is any part of the case in which the successful party has been unsuccessful, and also to consider whether the expense of any part of the proceedings has been occasioned by his own fault, and in either case to disallow the expense.[2] When the Auditor allows the successful party expenses of a part of the cause in which he was unsuccessful, or which were

[1] Murray *v.* Rennie & Angus, 1897, 24 R. 1026.

[2] M'Elroy *v.* Tharsis Co., 1879, 6 R. 1119; Craig *v.* Craig, 1907, 44 S.L.R. 100.

due to his own fault, the Court will, on the fact being brought to its notice, of new remit to the Auditor to tax off all expenses clearly relating to the part of the case in which the successful party has failed.[1] What exactly is signified by the word "fault" has not been the subject of express decision. It has, however, been decided that the stating of a plea which ought not to have been stated, does not entitle the Auditor to determine whether that particular plea should or should not have been stated, to the effect of entitling him to disallow the expense occasioned thereby.[2] But where a pursuer ultimately successful was obliged to restrict the conclusions of his petition before getting decree, the expense of so doing was held to have been rightly excluded from the general expenses to which he was held entitled.[3] The fact that the Court has modified, or intends to modify, expenses is no concern of the Auditor's; and where expenses are awarded subject to modification, the Auditor must tax the account as if the finding of expenses had been general, leaving the Court to fix the modification subsequently.[4] But where a pursuer was found entitled to two-thirds of his expenses, the Court held that the Auditor, before deducting the one-third, had rightly disallowed charges which had reference to those parts of the case in which the pursuer had been unsuccessful.[5]

*Outlays.*—All necessary and reasonable outlays, which are duly vouched and the receipts produced to the Auditor, are allowed on taxation. The outlay must, however, be real, and therefore discounts allowed to the agent by persons whom he has employed must be credited to the client.[6] Where a proof is taken, the cost of transcribing the shorthand writer's notes must be paid by the unsuccessful party, although no use be made of them.[7] A party to an action who gives evidence is entitled to be paid as a witness. Thus, where a party who was a necessary witness travelled from Vancouver to give evidence at the trial, he was held entitled to recover the costs of his journey as against the unsuccessful pursuer.[8]

[1] Wemyss Trs. *v.* Hope, 1903, 11 S.L.T. 106 (O.H.).

[2] Welsh *v.* Eastern Cemetery Co., 1894, 21 R. 769.

[3] Fimister *v.* Milne, 1860, 22 D. 1100.

[4] M'Elroy *v.* Tharsis Co., *sup.*; Strang *v.* Brown, 1882, 19 S.L.R. 890.

[5] Arthur *v.* Lindsay, 1895, 22 R. 904.

[6] Ronaldson *v.* Drummond & Reid, 1881, 8 R. 956.

[7] Marshall *v.* Shearer Bros., 1903, 11 S.L.T. 36 (O.H.).

[8] Dairon *v.* Dairon's Trs., 1900, 3 F. 230.

*Witnesses' Fees.*—Where it is necessary to employ skilled persons to make investigations[1] prior to a proof or trial in order to qualify them to give evidence thereat, charges are allowed for the trouble and expenses of such persons of such amount as may appear fair and reasonable, provided that the Sheriff who tries the cause, on a motion made either at the proof or trial or when leave is asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certifies such skilled persons for such charges. Notice of the application for the Sheriff's certificate need not be given to the other side.[2] The certificate is imperative, and if it is not obtained within the statutory period, the expenses of the expert witnesses cannot be allowed.[3] In a case in the Court of Session under a similar provision contained in the Act of Sederunt of 15th July 1876, it was held that reasonable remuneration to expert witnesses forms a good charge in the bill of costs in an action which had been settled, and that no certificate was necessary.[4] The omission of the certificate cannot be remedied on appeal.[5] Charges for witnesses present at a trial or proof, but not examined, nor held as concurring with a witness who has been examined, may be allowed, provided a motion to that effect is made at the close of the proof, and the Sheriff, then or subsequently, grants the same and the witnesses' names are noted. Unless this is done the Auditor must disallow any charges made for such witnesses.

**Objections to Auditor's Report.**—At the conclusion of the taxation the Auditor appends to the account a report stating the sum at which he has taxed the account. The account, with the report annexed, is then lodged with the Sheriff-Clerk for the approval of the Court. The Statute makes no provision that the account shall be lodged within any particular time, the time of lodging being left wholly within the control of the party who holds it. Nor does the Act make any provision for notice of the lodging to be given to the opposite party. Considerations of ordinary fairness would seem to impose on the agent lodging an account the duty of intimating the fact to his opponent. In practice, the Sheriff may,

[1] *See* Ferguson *v.* Johnston, 1886, 13 R. 635; Ebbw Vale Steel Co. *v.* Wood's Tr., 1898, 25 R. 925.

[2] Ld. Elphinstone *v.* Monkland Iron & Coal Co., 1887, 14 R. 449.

[3] M'Callum's Trs. *v.* M'Nab, 1868, 6 M. 647; Tough's Trs. *v.* Dumbarton Water Comrs., 1874, 1 R. 879.

[4] Clements *v.* Edin. Corporn., 1905, 7 F. 651.

[5] Gibson *v.* West Lothian Oil Co., 1887, 14 R. 578.

however, refuse his assent to any account unless it be accompanied by a statement that such intimation has been duly made.[1] Within two days after the lodging of the report, it is competent for either party to lodge a note of objections, which are then disposed of by the Sheriff summarily, either with or without answers, as he deems most expedient.[2] In the Court of Session, after taxation it is necessary for the successful litigant to move the Court for the approval of the Auditor's report. In the Sheriff Court, however, after the account with the Auditor's report is lodged, if no objections are stated, or if objections are stated and overruled or sustained, the Sheriff approves of the account as taxed by the Auditor, or as altered or modified after hearing parties, and grants decree for the amount, without any formal motion for approval by the successful litigant. Subject to express directions by the Sheriff as to the scale of taxation or the disallowance of certain items of expense, the taxation of the account is left entirely in the hands of the Auditor, and it may be said as a general rule, that only in exceptional circumstances the Court will interfere with his discretion.[3] The Auditor has, however, no power to refuse the expense of proceedings which have been ordered by the Court.[4] The appropriate time for objecting to the apportionment of expenses, and generally for determining all questions as to the liability of the parties to particular expenses, and in particular whether one or two sets of defences are to be allowed, is when the finding of expenses is made and the case is fresh in the recollection of the Court, and not by way of objections to the Auditor's report.[5] Thus, where the defenders objected to the Auditor's report on the ground that he should have disallowed the expenses of a proof, the Court held that the objection was stated too late.[6] Similarly, the Court will refuse to modify expenses after a remit has been made to the Auditor to tax the account.[7] An objection to a specific entry allowed by the Auditor should state what the objector

[1] *See* Porteous *v.* Cal. Rly. Co., 1891, 29 S.L.R. 21.

[2] Act, Rule 100.

[3] Tough's Trs. *v.* Dumbarton Water Comrs., *sup.*; Tannett, Walker, & Co. *v.* Hannay & Sons, 1874, 1 R. 440.

[4] Stott *v.* M'William, 1856, 18 D. 716.

[5] Warrand *v.* Watson, 1907, S.C. 432; "Fulwood" SS. Ltd. *v.* Dumfries Harbour Comrs., 1907, S.C. 735; Murray *v.* Macfarlane's Trs., 1895, 23 R. 80; *cf.* Mackellar *v.* Mackellar, 1898, 25 R. 883; *see supra*, Modification of Expenses, and cases there cited.

[6] Electric Construction Co. *v.* Hurry & Young, 1897, 24 R. 525.

[7] Mackellar *v.* Mackellar, *sup.*

maintains to be the fair charge.[1] The particular expenses of the discussion of the Auditor's report are awarded against the objector if he is unsuccessful. Where, however, the Auditor reports a point for the consideration of the Court, no expenses are, as a rule, allowed to either party.[2]

**Expenses of Taxation and Decree.**—As a general rule, the party liable for the account pays the expenses of taxation. If, however, the amount struck off by the Auditor be excessive, the expense of taxation may be laid on the party entitled to the account. What is an excessive amount is dependent on various circumstances, but generally it may be said that where an amount equal to or more than 20 per cent. of the total is disallowed, the Court will incline to award the expense of taxation to the unsuccessful party. The matter is one, however, within the discretion of the Sheriff. The cost of obtaining approval of the Auditor's report, and of the decree for expenses which follows, is paid by the losing party. But liability for such expenses is avoided by previously tendering the amount awarded,[3] including the expense of extracting the principal decree, since the successful party is entitled to extract the decree even if his expenses be paid.[4] Interest on the expenses runs from the date of the decree therefor.[5]

**Agent's Right to Charging Order.**—In every case in which a law agent is employed to pursue or defend any action or proceeding in any Court, the judge before whom such action or proceeding has been heard, or is depending, may declare the agent entitled to a charge upon and against, and a right of payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which may be recovered or preserved on behalf of his client, for the taxed expenses of, or in reference to, such action or proceeding. The judge may make such order or orders for the taxation of, and for the raising and payment of such expenses out of the property as may appear just and proper. Any act done or deed granted by the client

[1] Crossan *v.* Cal. Rly. Co., 1902, 5 F. 187.

[2] Nisbet *v.* Dixon & Co., 1853, 15 D. 778; Dempster *v.* Wallace & Co., 1834, 12 S. 844.

[3] Allan *v.* Allan's Trs., 1851, 13 D. 1270; Bannatyne *v.* M'Lean, 1884, 11 R. 681; Leith Mags. *v.* Gibb, 1882, 19 S.L.R. 399.

[4] Scott *v.* N. B. Rly. Co., 1860, 22 D. 922; Rutherglen P. C. *v.* Glenbucket P. C., 1896, 33 S.L.R. 368 (O.H.); Orr *v.* Smith, 1891, 28 S.L.R. 539; Williams *v.* Carmichael, 1874, 11 S.L.R. 530.

[5] Wallace *v.* Henderson, 1876, 4 R. 264.

after the date of declaration, except acts or deeds in favour of a *bona fide* purchaser, are absolutely void, and of no effect against such charging order.[1] It is entirely within the discretion of the Court to grant the charging order. The Act has been held not to apply where, after decree, the estate of the client has *de facto* passed into the hands of a third party,[2] nor to a case where the property was not "preserved" by the agent in the sense of the Statute. Thus, in one case beneficiaries under a trust were sisted as defenders in an action against the trustees, but the trustees remained parties and continued their defence, which was ultimately successful. The agents of the beneficiaries were held not entitled to a charging order on the estate "preserved" to the trust, although they averred that theirs was the substantial defence, the trustees having intimated that they did not propose defending the action.[3] Estate recovered and brought into a trust by a liferenter was held not to be recovered on his behalf so as to warrant the Court in granting such an order.[4] But law agents were found entitled to a charging order for extra judicial expenses under the section,[5] and to a fund recovered on behalf of their client.[6] Where the conduct of a litigation in the Court of Session requires the services of a local agent as well as that of an Edinburgh agent, the former, equally with the latter, is an agent employed to sue or defend the action within the meaning of the section, and entitled to apply under that section for a charging order.[7]

*Decree in Agent's Name.*—In the event of no objections having been lodged to the Auditor's report, or if objections have been lodged and disposed of, decree for the expenses taxed follows as a matter of course, and the Sheriff may allow the decree for expenses to go out and be extracted in the name of the agent who conducted the cause.[8] The privilege of obtaining decree in the name of the agent disburser is based upon the fact that the fund in question has, so to speak, been brought into practical existence through the agent's exertions.[9]

[1] The Law Agents and Notaries Public (Scotland) Act, 1891, s. 6.

[2] Tait & Co. *v.* Wallace, 1894, 2 S.L.T. 261.

[3] Hutchison's Trs. *v.* Hutchison, 1902, 40 S.L.R. 200.

[4] Carruther's Trs. *v.* Finlay & Wilson, 1897, 24 R. 363.

[5] Paton *v.* Paton's Trs., 1905, 13 S.L.T. 96 (O.H.).

[6] Stenhouse *v.* Stenhouse's Trs., 1903, 10 S.L.T. 684 (O.H.).

[7] Bannatyne, Kirkwood, France, & Co., 1907, S.C. 705.

[8] Act, Rule 99.

[9] Lochgelly Iron & Coal Co. *v.* Sinclair, 1907, S.C. 442, *per* Ld. Pres. Dunedin.

Where the client has died during the process, the Court will not give decree in name of the agent until the client's representatives have been sisted.[1] The application for decree in the agent's name, which is usually and properly made when moving for decree, appears to be competent any time before extract. A party to an action who allows without objection his opponent's agent to obtain decree for expenses in his own name, cannot afterwards suspend a charge on the ground that the agent was not *de facto* the agent disburser, or that he was not duly qualified as a Law Agent.[2] Even if decree for expenses has gone out in the client's name, the agent appears entitled, in a suspension of the decree, to appear and vindicate his right.[3] When such a decree is granted, its effect is to make the expenses payable to the agent and not to the client, and therefore it is not infrequently craved for the purpose of preventing or avoiding claims of compensation, which the party against whom expenses are awarded might competently maintain against his opponent, but which are incompetent as against that party's agent. The granting of decree in name of the agent is within the discretion of the Court, and it may be refused if the litigant's conduct has been such as to justify such refusal.[4] The agent's right to expenses cannot be defeated by pleading compensation on a debt due by the client,[5] nor by an arrestment of the consigned expenses by the client himself.[6] The agent must, however, submit to a deduction of the expenses awarded to the other side in the same action,[7] or in an action with reference to the same subject-matter.[8] But where the two actions are different or relate to different matters, compensation between claims of expenses cannot be pleaded against the agent in whose name decree has gone out.[9] Where the successful defender in an action, after extracting his decree for expenses, raised a counter action against the original pursuer, arising out of the same subject-matter, lost the action, and was in turn found liable in expenses, it was held that no compensation was possible between these

[1] Baillie *v.* Baxter & Mitchell, 1872, 10 M. 414.

[2] Rennie *v.* James, 1908, S.C. 681, *following* Ewing *v.* Wallace, 1832, 6 W. & S. 222.

[3] M'Tavish *v.* Pedie, 1826, 4 S. 710.

[4] Bloe *v.* Bloe, 1882, 9 R. 894.

[5] M'Kenzie *v.* Ross, 1823, 2 S. 356; Miller *v.* Geils, 1848, 10 D. 1384.

[6] Ellis *v.* Mackersie, 1831, 9 S. 585.

[7] MacGillivray *v.* Mackintosh, 1891, 19 R. 103; Dixon *v.* Murray, 1894, 1 S.L.T. 600 (O.H.).

[8] Portobello Pier Co. *v.* Clift, 1877, 4 R. 685; Grieve's Trs. *v.* Grieve, 1907, S.C. 963.

[9] Paterson *v.* Wilson, 1883, 11 R. 358; Stuart *v.* Moss, 1886, 13 R. 572; Strain *v.* Strain, 1890, 17 R. 566.

claims for expenses, as the prior action was no longer pending, and decree was allowed to go out in the name of the Agent.[1] Where the pursuer of an action of damages for seduction, who was unsuccessful and found liable in expenses, thereafter raised an action of affiliation and obtained decree for expenses, a motion in the second action for decree in the name of the agent was refused.[2] Where a pursuer raised consecutively two separate actions with reference to the same accident, in the first of which he was unsuccessful, expenses being awarded against him, the Court refused to allow decree for expenses in the second action to go out in name of the agent, holding that it would be a matter of hardship and injustice that the pursuer should be allowed to evade all liability for the expenses of the first action by the device of getting decree in name of his agent in the second.[3] An agent who takes decree in his own name and recovers the expenses, will be personally liable in repayment in the event of the principal decree being reversed on appeal.[4]

*Agent's right to sist himself for Expenses.*—The right of an agent to be sisted in an action in order to recover the expenses incurred to him by his client is limited to three cases: (1) Where his client has obtained a decree for expenses, or (2) a judgment necessarily leading to such a decree[5]; or (3) where there has been collusion between the parties in order to defeat his claim.[6] The parties cannot, therefore, outwith his presence, enter into a compromise so as to defeat the right of the agent of the successful party to recover the expenses incurred to him by his client, and if they do the agent is entitled to sist himself as a party to the cause and to carry it on to the effect of obtaining decree for his expenses.[7] Where there has been no interlocutor expressly awarding expenses, or from which expenses must necessarily follow, the agent, in order to be entitled to sist himself, must be able to aver and prove that the parties, in compromising the case, and so defeating his right to decree for expenses, have been actuated by bad faith and with the collusive intention of defeating

[1] Paolo *v.* Parias, 1897, 24 R. 1030, *distinguishing* Portobello Pier Co. *v.* Clift, *sup.*; *see also* Bruce *v.* Adamson, 1900, 8 S.L.T. 13 (O.H.).

[2] Oliver *v.* Wilkie, 1901, 4 F. 362; *see* Nelson & Co. *v.* Glasgow Corpn., 1908, S.C. 879.

[3] Lochgelly Iron & Coal Co. *v.* Sinclair, 1907, S.C. 442.

[4] Cormack *v.* Tod, 1845, 7 D. 812.

[5] Welsh *v.* Cousins, 1898, 35 S.L.R. 656 (O.H.).

[6] Crawford *v.* Smith, 1900, 8 S.L.T. 249 (O.H.).

[7] Crawford *v.* Smith, 1900, 8 S.L.T. 249 (O.H.); M'Gregor *v.* Martin, 1867, 5 M. 583.

his claim,[1] and probably he must also aver his client's inability to pay the expenses. An agent is not, however, entitled to proceed with an action against the instructions of his client merely with a view to recovering his expenses from the opposite party, either in name of the client or by getting himself sisted as a party.[2] Thus, where the parties to an action of divorce, on the dependence of which inhibition had been used, resumed cohabitation, the Court dismissed the action, recalled the inhibition, and refused a motion to sist the wife's agent, and allow the inhibition to stand till his account was paid.[3]

**Agent's Liability for Expenses.**—Apart from certain items for which a law agent is always primarily liable, such as the dues of Court, the fees of witnesses and of jurors, an agent will be held personally liable only for expenses occasioned by his gross negligence or fault.[4] If, however, an agent conducts a cause without the authority of his principal, he will be held personally liable to his opponent in expenses, in the event of his principal disclaiming the action.[5] In one case an agent was found liable in expenses when, at the request of a person alleged to be imbecile, he had opposed measures taken to have his property put under guardianship,[6] but the authority of this decision, from which Lord Justice-Clerk Inglis dissented, is discounted both by that fact and by that of a subsequent case, in which an agent, who on the instructions of a lunatic opposed (though unsuccessfully) the appointment of a *curator bonis*, was allowed his expenses both in the Court of Session and in the House of Lords.[7] If any question arises as to an agent's authority to conduct a cause, he must produce his mandate, and if he fails to do so he may be held personally liable for the expenses occasioned.[8]

**Separate Action for Expenses Incompetent.**—A separate action or petition to recover expenses incurred in other proceedings is incompetent,[9] except in the case of an agent for a wife in a

[1] Murray *v.* Kyd, 1852, 14 D. 501; M'Lean *v.* Auchinvole, 1824, 3 S. 129; Smith *v.* Smith, 1871, 9 M. 538.

[2] Elliot *v.* Elliot, 1893, 1 S.L.T. 261 (O.H.); Wales *v.* Wales, 1901, 9 S.L.T. 371 (O.H.); Riddle *v.* Riddle, 1904, 12 S.L.T. 361 (O.H.).

[3] Wales *v.* Wales, *sup.*

[4] *See* M'Kechnie *v.* Halliday, 1856, 18 D. 659.

[5] Robertson *v.* Ross, 1873, 11 M. 910; Cowan *v.* Farnie, 1836, 14 S. 634; Philip *v.* Gordon, 1848, 11 D. 175.

[6] M'Call *v.* Sharp, 1862, 24 D. 393.

[7] Mitchell & Baxter *v.* Cheyne, 1891, 19 R. 324.

[8] Hepburn *v.* Tait, 1874, 1 R. 875.

[9] Ledgerwood *v.* M'Kenna, 1868, 7 M. 261; Young *v.* Nith Comrs., 1880, 7 R. 891.

consistorial action, because in such a case it may not be competent to grant decree to her agent in the original process.[1] Thus, where a wife raised an action of separation and aliment, but before the proof returned to her husband's home, her agent moved to be sisted as a party to the action, and craved decree for payment of his account of expenses against the husband, but the Court held that his proper course was to sue the husband in a separate action, and dismissed the action.[2] According to the rule, if arrestments used on the dependence are recalled without a finding or reservation of expenses, expenses cannot be moved for subsequently either in the petition for recall or in the action.[3] A subsidiary action for expenses is, however, competent against the true *dominus litis*.[4]

**Party Conducting his own Cause.**—A person who conducts his own cause and is found entitled to expenses, cannot recover expenses in respect of his absence from business or for his time and trouble, and is entitled only to a reasonable sum for outlays, judicial and extrajudicial.[5]

**Appeal on Questions of Expenses.**—An appeal on a question of expenses is competent both to the Sheriff and to the Court of Session,[6] but such appeals are generally discouraged by the Court.[7] Appeals on matters of expenses can only be justified where the actual award is such as to amount to a miscarriage of justice, or when the amount of the expenses at stake are out of proportion to the merits of the cause, or where a question of principle is involved. Thus, in one case a personal creditor of a tenant poinded certain effects which had already been sequestrated for rent. The proprietrix having brought an action of interdict in the Sheriff Court against the tenant and the poinding officer, she, having herself sold the subjects, restricted her conclusion to one of expenses, which she was awarded. The Court, on appeal, entertained the question on the grounds that the expenses were really the merits, the whole question being whether the application for interdict was justified.[8] An interlocutor granting

[1] Clark *v.* Henderson, 1875, 2 R. 428.

[2] Riddle *v.* Riddle, 1904, 12 S.L.T. 361 (O.H.).

[3] Dobbie *v.* Duncanson, 1872, 10 M. 810.

[4] *See supra*, *Dominus litis*, p. 647.

[5] Forbes *v.* Whyte, 1891, 18 R. 688.

[6] Bowman's Trs. *v.* Scott's Trs., 1901, 3 F. 450; Barrie *v.* Cal. Rly. Co., 1903, 5 F. (H.L.). 30.

[7] Caldwell *v.* Dykes, 1906, 8 F. 839; Fleming *v.* N. Scot. Banking Co., 1881, 9 R. 11.

[8] Wyllie *v.* Fisher, 1907, S.C. 686.

decree for the taxed amount of expenses is not appealable.[1] An interlocutor which disposes of objections to the Auditor's report is, however, subject to review, and an appeal is competent against an interlocutor approving of the report and decerning for the expenses as brought out, if a question of taxation is *ex facie* raised by the report, even if no written objections have been lodged.[2]

[1] Maxwell's Trs. *v.* Kirkintilloch P. C., 1883, 11 R. 1.

[2] Innes *v.* M'Donald, 1899, 1 F. 380; Craig *v.* Craig, 1907, 44 S.L.R. 100.

# PART VI

## THE SMALL DEBT COURT

# CHAPTER XXXVIII

## THE SMALL DEBT COURT

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### VI. Review by Suspension and Reduction, when Competent

## I. Jurisdiction and Actions Competent

**Jurisdiction.**—The jurisdiction of the Sheriff and the procedure in Small Debt causes is regulated by the Small Debt Acts, which,

by the Act of 1907, are defined to "mean and include the Small Debt Acts 1837 to 1889, and Acts explaining and amending the same."[1] The Act of 1889 provided that its provisions should be construed along with those contained in the Act of 1837 and the Sheriff Courts Act of 1853, and that the Act, along with the two recited Acts, might be cited as the Small Debt Acts 1837 to 1889. Certain sections of the Sheriff Court Act of 1876 were, by section 5 of that Act, incorporated in the Act of 1889. But both the Act of 1853 and of 1876 have been repealed, though, with one exception, the provisions contained in the Act of 1876 have been re-enacted by the Act of 1907. The definition of the term Small Debt Acts contained in the Act of 1907 is therefore defective, in so far as it fails to notice the fact that two of the Acts explaining and amending the Small Debt Acts 1837 to 1889 have been expressly repealed by its provisions. Further, the Citation Amendment Act of 1871, though not an Act which falls within the definition of "the Small Debt Acts 1837 to 1889," is an Act which applies solely to proceedings in the Small Debt Court, and therefore in a sense may be said to "explain or amend" these Acts. The terms Small Debt Acts 1837 to 1889 must therefore be understood to mean the Small Debt Acts of 1837 and 1889, and the Citation Amendment Act of 1871, exclusively. These three Acts, together with certain sections and rules contained in the Act of 1907, now therefore regulate the procedure in the Small Debt Court.

**Extent of Jurisdiction.**—(1) *Territorially* the jurisdiction of the Sheriff in the Small Debt Court is the same as in the ordinary Court,[2] and the Sheriff possesses the same power to transfer a cause to another Sheriffdom as he has in the case of ordinary actions.[3] (2) As regards the *subject-matter* of the action, nothing in the Act derogates from any jurisdiction, powers, or authority formerly possessed or in use to be exercised by the Sheriff in Small Debt causes, but his jurisdiction is expressly extended to include actions of aliment.[4] All causes competent under the provisions of the Small Debt Acts in which the value of the cause does not exceed £20, may now be instituted in the Small Debt Court.[5] (3) As

[1] Act, s. 3 (j).
[2] Act, ss. 4, 45.
[3] Act, Rules 19, 20, 21.
[4] Act, Rules 5 (2), 45.
[5] Act, s. 42.

regards *persons*, any action competent in the Small Debt Court may be brought within the jurisdiction of the Sheriff on the same grounds, as regards the defender, as in the case of an ordinary action.[1] But actions for interdict against an alleged wrong being committed or threatened to be committed within the jurisdiction, are, as will be seen, incompetent in the Small Debt Court. Section 3 of the Small Debt Act of 1889, which has not been repealed by the Act of 1907, confers jurisdiction on the Sheriff in Small Debt causes where the defenders, if more than one, reside in different counties. But the Sheriff has power, only on the motion of the pursuer, and being satisfied that such course is expedient, to grant warrant for the issue of the summons against all or any of the defenders to appear before him. Section 6 of the Act of 1907 provides that any action competent in the Small Debt Court may be brought within the jurisdiction of the Sheriff where the defender (or when there are several defenders, where one of them) resides within the jurisdiction, or, having resided there for forty days immediately prior to the raising of the action, has ceased to reside there for less than forty days, and whose present address in Scotland is unknown. Under the former provision a defender resident outwith the jurisdiction can only be convened in an action provided (first) the pursuer of the action moves the Sheriff to permit the issue of the summons against him, and (secondly) that the Sheriff is satisfied that such a course is expedient. By the latter provision the pursuer possesses an absolute right, uncontrolled by the exercise of any discretion on the part of the Sheriff, to bring an action within the jurisdiction of any Sheriff, provided such action be otherwise competent, against a defender resident outwith the jurisdiction at the time, provided only that another defender either happens to reside within the jurisdiction, or has, within forty days of his disappearance, had a residence in the jurisdiction for a like period. The two provisions are therefore absolutely inconsistent, yet the former and more limited has not been expressly repealed. It must, however, it would seem, be held to be repealed by implication, since the Act of 1907 is one to extend and amend the law and practice relating to civil procedure in the Court. But while the pursuer possesses an absolute right in the choice of the jurisdiction in which he may institute his

[1] Act, ss. 6 (*except* e), 45.

action, some limit and control as to the *forum* in which the action must be followed forth is reserved to the discretion of the Sheriff before whom the action is brought, by the power which he possesses of subsequently transferring the cause to the jurisdiction which he may consider most appropriate for its trial.[1]

**Actions Competent.**—All causes competent under the Small Debt Acts, in which the value of the cause does not exceed £20,[2] may be raised in the Small Debt Court. The actions competent in the Court are, under the Act of 1837: (1) Petitory actions, (2) actions of furthcoming, (3) actions of multiplepoinding, (4) sequestration for rent; under the Act of 1889, (5) actions for delivery of corporeal moveables; and under the Act of 1907, (6) actions of aliment.[3] The special proceedings under the Employers' and Workmen's Act, 1875, now seldom resorted to, and in summary removings, neither of which are Small Debt actions, properly so called, have already been dealt with.

*Value of Cause.*—The value of the claim at the date when the action is brought is the criterion by which its competency on the ground of value is decided. If the claim exceed £20 in value it may be restricted to that amount, in which case the pursuer is held to have abandoned his debt so far as it exceeds the limit.[4] But the expenses of bringing or conducting the action are not included. The provision as to abandonment extends to the claim only so far as the purposes of the action with regard to competency on the ground of value are concerned; and if the action be abandoned before the summons is served,[5] or the action is dismissed as irrelevant,[6] the pursuer's claim for the original amount is not thereby destroyed. And where a pursuer restricts a claim, which originally amounted to more than £20, so as to bring it within the statutory limit, items which are disallowed by the Sheriff fall to be deducted not from the sum so restricted, but from the amount of the original claim.[7] A pursuer who has several distinct claims against a defender, each not exceeding £20, may competently bring several actions concluding for

[1] Act, Rules 19, 21.

[2] Exclusive of expenses and fees of extract, Act of 1837, s. 2.

[3] The Court of Session Act of 1830, s. 32, now repealed, conferred upon the Sheriff the power to determine "questions of aliment."

[4] Act of 1837, s. 2.

[5] Nelson *v.* Lanarkshire C. C., 1891, 7 Sh. Ct. Reps. 3.

[6] Bryce *v.* Langlands, Guthrie's Sel. Ca. ii. 414.

[7] Dalgleish & Kerr *v.* Anderson, 1883, 20 S.L.R. 412.

the separate amounts due, though the claim in the aggregate amount to more than the statutory limit.[1] But where a merchant who sold groceries and clothing at separate counters of the same shop, sued his customer and obtained decree for groceries supplied, it was held that he was subsequently barred from suing the customer for clothing supplied during the same period as that embraced in the grocery account, on the ground that by suing for one portion of the account he must be held to have abandoned his right to the remainder.[2] On similar grounds, a creditor in a joint and several obligation is not entitled to split the liability of the defenders so as to enable him to sue them separately in the Small Debt Court.[3]

While it is clear under the provisions of the Act of 1907 that an action which concludes (without restriction of the amount) for a sum exceeding £20 cannot be raised in the Small Debt Court, it is not clear whether an action which concludes for payment of a sum below that limit can be raised only in that Court. It was not incompetent prior to the Act of 1907 to raise in the ordinary Court an action the value of which was below the (then) statutory limit of actions competent in the Small Debt Court, though if a pursuer did so he was allowed only Small Debt expenses, unless the Sheriff saw cause to the contrary.[4] The Act of 1907 does not in terms curtail that power. But some difficulty seems to be created by the fact that under its provisions an action which concludes for less than £50 cannot under any circumstances be an "ordinary" action, while a summary action is defined as one between £20 and £50 in value. An action below £20 in value cannot, therefore, it would appear, be either an ordinary or a summary action. The difficulty thus created is intensified by the terms of the Act of Sederunt of 10th April 1908, dealing with the taxation of expenses in the ordinary Court, which provides that where the demand made does not exceed the value which may be competently concluded for in the Small Debt Court, Small Debt expenses only shall be allowed, unless the Sheriff appoints otherwise.[5] The terms of the Act of Sederunt would appear to be conclusive as to the construction which must be put upon the provisions of the Act. It must therefore be assumed, in the absence of express decision to the contrary, that actions involving a sum in dispute

[1] Fraser *v.* Ferguson, 1870, 42 Jur. 396.

[2] Fraser *v.* Keddie, Guthrie's Sel. Ca. ii. 416.

[3] Hewats *v.* M'Farlane, 1907, 23 Sh. Ct. Reps. 109.

[4] A. S. 1878, Gen. Reg. 2.

[5] A. S. 10th April 1908, Gen. Reg. 2.

below the limit in value competent in the Small Debt Court, may competently be raised in the ordinary Court. Presumably, such actions must be held to be summary causes.

*Petitory Actions.*—A petitory action may conclude for payment of a sum of money not exceeding £20, due on any kind of claim competent in the ordinary Court. The Act of 1837 contains a special provision that claims for compensation for injury by riot may be settled under it.[1] An action is not necessarily incompetent in the Small Debt Court because it raises a question of continuing liability, such as future aliment, provided the sum for which decree is asked does not exceed £20.[2] As questions involving *status* are wholly outwith the jurisdiction of the Sheriff, a claim by a wife for aliment against her husband is incompetent if the decision of the question of aliment necessitates, directly or indirectly, the decision of the question of *status*.[3] And it has been held competent to try, in an action for the recovery of a sum below the £20 limit, said to have been paid in premiums of a policy of insurance, the question of the validity of the policy, although the sum insured under it was £250.[4] An action, though petitory in form, is not competent in the Small Debt Court if in substance and effect it involves a question of accounting, or of count and reckoning.[5]

## II. Procedure

**Summons.**—The form of summons, which is a survival of that in use in all pecuniary actions prior to 1876, is provided by Schedule A of the Act of 1837, and contains a warrant to cite the defender and witnesses and to arrest on the dependence. It must, of course, contain the names and designations of both pursuer and defender, though the instance may be amended and new parties added at any stage of the cause.[6] It must also contain the amount sued for (which may be amended or increased at any stage of the cause[6]), a short statement of the origin of the debt or ground of action, and,

[1] Act, 1837, s. 22.

[2] Nixon *v.* Caldwell, 1876, 3 R. (J.) 31; Gerry *v.* High, Guthrie's Sel. Ca. i. 417.

[3] Strang *v.* Strang, 1882, 19 S.L.R. 724; 4 Coup. 563.

[4] Provincial Homes Invest. Co. *v.* Leven, 1904, 6 F. (J.) 62.

[5] *See* Pollock *v.* Fulton, 1906, 22 Sh. Ct. Reps. 161; Shaw *v.* "Falls of Inversnaid," 1893, 8 Sh. Ct. Reps. 18.

[6] Act, Rules 26, 79, 80; Act of 1889, ss. 4, 5.

whenever possible, the date of the cause of action or last date in the account. The ground of debt must be set forth in the summons itself, or on the back of it, or on a separate paper annexed to the summons,[1] referred to[2] and served along with it, otherwise there is no valid service.[3] Thus, a summons having annexed an account "To goods" with date and price, is insufficient specification[4]; but a summons for goods sold and delivered "per pass book," without giving the last date of the account, has been held valid.[5] So a summons on an account for a year's medical attendance, detailing neither visits nor specific charges, was sustained.[6] Where a decree for damages done to goods in transit was obtained in an action, the summons of which referred to an account which bore *ex facie* to be for goods sold, the decree was set aside.[7] The summons must further specify the date and hour of diet to which the defender is summoned, which must not be sooner than the sixth day after citation.[8] It must also have printed on it the Small Debt table of fees, a Sheriff-Clerk issuing a summons without such table being liable to a fine.[9] If the summons be lost or destroyed, it may be replaced in the same way and subject to the same conditions as a lost pleading in an ordinary cause.[10]

**Citation.**—A copy of the summons with the citation annexed and a copy of the account or statement are served upon the defender either (*a*) By an officer, either personally or at the defender's dwelling-place, or, in the case of a company, at its ordinary place of business.[11] No witness is necessary.[12] When the citation is keyhole, or when it is left with an inmate, the defender having removed within the forty days, the officer must make diligent search for the defender's address, and, over and above the usual citation, send him by registered letter a copy of the summons. The post office receipt for the registration must accompany the execution, and the circumstances preventing execution in the usual way must be stated.[13] (*b*) By an officer or enrolled law agent sending a copy

[1] *See* Aitken *v.* Learmouth, 1855, 2 Irv. 156.

[2] Grange *v.* Mackenzie, 1866, 5 Irv. 324.

[3] Brown *v.* Richmond, 1833, 11 S. 407.

[4] Cox *v.* Jackson, 1877, 4 R. 898.

[5] Hamilton *v.* Bain, Guthrie's Sel. Ca. i. 405.

[6] Mowat *v.* Martine, 1856, 2 Irv. 435.

[7] G. & S.-W. Rly. Co. *v.* Wilson, 1855, 2 Irv. 162.

[8] Act of 1837, s. 3, Sch. A.

[9] *Ibid.*, s. 33.

[10] Act, Rule 17.

[11] Act of 1837, s. 3; Act, Rule 11.

[12] Cit. Amend. Act, 1871, s. 4.

[13] *Ibid.*, s. 3.

in a registered letter.[1] A law agent may serve a summons at his own instance,[2] but in such a case he must himself sign the citation.[3] If the Sheriff is satisfied that the letter was tendered at the proper address but refused by the defender, he may hold the tender as good citation.[4] Receipt of the letter by any person authorised to receive it constitutes a good citation.[5] Citation by post is effectual only in cases where it does nor require to be personal.[6] Any irregularity in the citation may be amended by reservice, on such conditions as the Sheriff may consider just.[7] If the defender appears he is barred from stating any objection to the regularity of the service upon himself, unless where jurisdiction has been constituted by citation or by arrestment *ad fundandam jurisdictionem*.[8] A defender resident within the district of a Circuit Small Debt Court may be cited either to it or the principal Court.[9] Endorsement is not necessary for service or arrestment on the dependence beyond the county.[10] A firm may be sued under its descriptive name and cited at its place of business[11] (*c*) edictally, where necessary, as in the case of unknown tutors and curators, or of parties abroad.[12]

**Arrestment on the Dependence.**—On the warrant to arrest contained in the summons, any money, goods, or effects to the extent of £20 in the possession of any third party in the county may be arrested on the dependence. A copy of the schedule of arrestment must be sent by registered letter to the arrestee, if the arrestment is not served personally, and in his execution the officer must certify that he has done so, and state the address to which the copy has been sent.[13] If the arrestee is a firm or a corporation, a copy of the schedule must be sent to the arrestee's place of business if known, or if not known, to any known place of business, the officer certifying to that effect.[13] The arrestment falls unless the action is served within seven days of the execution of arrestment, which must be reported forthwith.[14] The arrestment also falls on the expiry of

[1] Cit. Amend. Act, 1882.

[2] Addison *v.* Brown, 1906, 8 F. 443 ; *see ante*, Citation, p. 126.

[3] Liquidator Lactina Mfg. Co. Ld., 1885, 13 R. 342.

[4] Cit. Amend. Act, 1882, s. 4 (5) ; Spaulding *v.* Marjoribanks, 1903, 11 S.L.T. 71.

[5] Stewart *v.* Ree, 1885, 12 R. 563.

[6] *See* Act, s. 6 (f. i.) ; Rule 14.

[7] Act, Rule 12.

[8] Act, Rule 13.

[9] Stewart *v.* M'Gregor, 1868, 40 J. 654 ; *see* Mactavish & Co. *v.* Cameron, 1899, 15 Sh. Ct. Reps. 292.

[10] Act of 1889, s. 11 ; Act, Rule 10.

[11] Act, Rule 11.

[12] Act of 1889, s. 5; Act, Rules 14, 15.

[13] Act of 1889, s. 5 ; Act, Rule 126.

[14] Act, Rule 127.

three months from its date, unless (*a*) renewed by special warrant or order, which must be intimated to the arrestee, in which case it subsists for three months from the date of renewal, or (*b*) an action of furthcoming or multiplepoinding is sooner raised.[1] Wages cannot be arrested on a Small Debt summons.[2]

*Loosing of Arrestment.*—The arrestment may be loosed by the defender (*a*) lodging with the Sheriff-Clerk a bond of caution by one or more sufficient cautioners to his satisfaction, in the form of Schedule C annexed to the Act of 1837; (*b*) consigning the amount of the debt, with 5s. for expenses if the action is below £5, or 10s. if for a higher sum; or (*c*) by producing evidence that he has obtained decree of absolvitor, or has paid or consigned the sums decerned for or sued for, if decree has not been pronounced. A certificate by the Sheriff-Clerk that one of these conditions has been complied with operates as a warrant for loosing that or any other arrestment on the dependence of the same action.[3]

**Decree where Action Undefended.**—If a defender who has been duly cited fails to appear, either personally or by one of his family or by his agent, the pursuer may obtain decree against him.[4] If the pursuer or other representative fails to appear, the defender may obtain decree of absolvitor. The Sheriff has power to adjourn the case to the next or any other Court day if a sufficient excuse for delay is stated.[4] The powers of amendment of the initial writ competent in ordinary causes are applicable equally to those in the Small Debt Court.[5]

*Rehearing.*—A rehearing of any decree in absence may be obtained either by the defender or the pursuer, and by each party once, but once only.[6] 1. *By defender*, on condition (*a*) that he consigns with the Clerk of Court the expenses decerned for, and a sum of 10s. to meet further expenses, and (*b*) that sist is applied for before a charge is given; or, if a charge has been given, before implement thereof, and within three months of the date of the charge. The warrant, which is served like the principal summons, and in any county, without indorsation, sists execution till the next Court day, or any subsequent Court day to which the cause may be

[1] Act of 1837, s. 6.
[2] Wages Arrestment Act, 1845.
[3] Act of 1837, s. 8.
[4] Act of 1837, s. 15.
[5] Act, Rule 26; *see ante*, Chapter IX.
[6] Grange *v.* Mackenzie, 1866, 5 Irv. 324.

adjourned, and contains authority to cite witnesses and havers for both parties.[1] Sist is the only remedy open to the defender, redress by suspension being incompetent,[2] as is interdict against diligence on the decree, on the ground that the summons contained a misnomer in the defender's Christian name.[3] 2. *By pursuer*, where a decree of absolvitor has been pronounced in his absence, consigning, within one month, with the Clerk of Court the expenses awarded, and a further sum of 5s. to meet further expenses.[1] In each case the consigned expenses must be paid over to the pursuer or defender respectively, unless the Sheriff sees fit to order otherwise.[1] Sist and rehearing are competent although a previous sist has already been granted,[4] and after a second charge where the first charge has become inoperative after the lapse of a year.[5] But it will not be granted where the debtor has been charged upon the decree and the charge has been followed by poinding,[6] even if the poinding has been executed after the issue of the sist but before service thereof.[7] Nor will it be granted where both parties have appeared at the first calling. Thus, where both parties appeared and a remit before answer was made, a sist was held incompetent, because at the hearing decree was pronounced against one of the parties on account of his failure to attend.[8] But the rule does not apply where there has been no litiscontestation. Thus, where both parties appeared and the case was adjourned in consequence of the failure of the pursuer's witnesses to attend, it was held that a sist was not competent by reason that, at the adjourned diet, decree in absence against the defender had been pronounced.[9] Appeal is competent against an interlocutor allowing a sist on the same grounds as against a decree.[10]

**Procedure where Action Defended.**—The summons contains authority for citing witnesses for both parties, the service copy

[1] Act of 1837, s. 16.

[2] Turnbull *v.* Russell, 1851, 14 D. 45.

[3] Spalding *v.* Valentine, 1883, 10 R. 1092; Cruikshank *v.* Gow & Sons, 1888, 15 R. 326.

[4] Grange *v.* Mackenzie, 1866, 5 Irv. 324.

[5] Lochie *v.* Brown, 1863, 35 J. 461.

[6] Gow & Sons *v.* Thomson, 1895, 1 Adam, 534; Wyllie *v.* Lawson, 1863, 4 Irv. 441.

[7] Mackenzie *v.* Ross, Guthrie's Sel. Ca. i. 427.

[8] M'Neill *v.* M'Neill, 1891, 18 R. (J.) 38; Worrall & Co. *v.* M'Dowall, 1885, 13 R. (J.) 4.

[9] Oliver *v.* Simpson, 1898, 1 F. (J.) 12; Montgomery *v.* Laughran, 1891, 18 R. (J.) 25.

[10] Gow & Sons *v.* Thomson, *sup.*

being sufficient warrant for citing those of the defender. The witnesses must be given not less than forty-eight hours' notice,[1] and must be present at the first calling. Adjournments are not granted save on cause shown, and generally only upon payment of expenses. A witness duly cited who does not attend may be fined £2, and letters of second diligence may be granted to compel his attendance.[2] A witness may competently appear who has not been cited. Parties may appear personally, by a member of their family,[3] by an agent,[4] or by any one allowed by the Sheriff.[5] The Sheriff hears the parties *viva voce*, and either disposes of the case on the relevancy of their avertments or hears evidence as may be proper. The witnesses are sworn and examined in the usual way, but no record of the evidence is kept. The Sheriff may grant commissions to take the evidence of witnesses unable to attend, and may grant remits to persons of skill, as in ordinary actions.[6] Where a pursuer dies or is divested under the Bankruptcy or Cessio Acts, or assigns his right of action, his representatives, assignee, or trustee may, if the Sheriff sees fit, be sisted in his stead, by minute endorsed by the Sheriff on the summons.[7] A similar but more limited power is conferred in the case of defenders, the power of sisting being limited to the case of the defender's death or divestiture under the Bankruptcy or Cessio Acts.[7] The provisions of the Act of 1907 regarding amendments, and the adding of parties,[8] which apply to the Small Debt Court,[9] provide for the sisting of any additional parties who may become jointly interested with the original parties, as for instance the husband of a female defender who is married, or the assignee of a defender who has voluntarily assigned his effects.

*Counter-Claims.*—Where the defender intends to plead a counter-claim, he must serve a copy of it on pursuer at least one free day before the day of appearance, otherwise it cannot be pleaded, except with the pursuer's consent. The rules as to pleading and dealing with a counter-claim in the defences, and granting decree for it in whole or in part, or for the difference between it and the claim,

[1] Act, of 1837, s. 12.
[2] *Ibid.*
[3] Act of 1837, s. 15; Riach *v.* Wallace, 1889, 2 F. 149.
[4] Act, s. 44.
[5] Act of 1837, s. 15; Milne *v.* Leslie, 1888, 15 R. 460.
[6] Act, Rules 60, 63, 70.
[7] Act of 1889, s. 4.
[8] Act, Rules 79, 80.
[9] Act, s. 45.

in ordinary causes, apply to causes in the Small Debt Court.[1] But though these rules provide that it shall be sufficient if the defender "states his counter-claim in his defences, after which the Sheriff may deal with it as if it had been stated in a substantive action," it would appear to be still necessary to serve it on the defender in accordance with previous practice, for the reason that, as there are no "defences" in a Small Debt action in the sense contemplated by the rule, its terms do not seem wholly applicable to actions in the Small Debt Court. What constitutes a counter-claim may sometimes occasion difficulty. Thus, where a Sheriff allowed and gave effect in a defence to a claim for wages, to evidence of alleged excessive payments previously made by way of wages, an appeal against his judgment was sustained, on the ground that as such defence amounted to a counter-claim it was not competent to receive it in the absence of notice to pursuer.[2] Where, however, a deed or writing is founded on by a party to a cause, all objections to it may be stated and maintained *ope exceptionis*.[3]

*Remit to Ordinary Court.*—When the Sheriff is of opinion that the importance of the questions raised warrants the course, he may at any stage, and either upon cause shown or *ex proprio motu*, remit the case to the Ordinary Roll,[4] whereupon the cause proceeds in all respects (including appeal) as if it had been originally raised in the Ordinary Court.[4] Once the cause has been remitted this provision would seem to make appeal to the Justiciary Court incompetent.

*Judgment and Decree.*—The Sheriff may make avizandum where he finds it expedient to do so, and he may thereafter pronounce decree in usual form, either on an appointed day, even in the absence of the parties, or on a day not later than seven days from the date of hearing, without requiring the attendance of parties.[5] But he may pronounce judgment more than seven days after the hearing, provided the delay has neither been wilful nor has resulted in a miscarriage of justice.[6] The judgment, which may be pronounced by a Sheriff other than the one who hears the case and prepares it,[5]

[1] Act, s. 55.

[2] Taylor *v.* Ormond, 1906, 8 F. (J.) 76; Rolland *v.* Rolland, 1907, 44 S.L.R. 770.

[3] Act, Rule 50.

[4] Act, s. 48; *see* Wigtown Creamery Co. *v.* Portpatrick Distict Comee., 1903, 6 F. (J.) 3.

[5] Act of 1889, s. 10.

[6] Paterson & Sons *v.* Robinson, 1895, 22 R. (J). 45.

contains no findings in fact or law, but simply states the sum decerned for and the expenses. It is noted in the Book of Causes, the entry, when signed, constituting the warrant to the Sheriff-Clerk for issuing the decree. It is in the discretion of the Sheriff to allow the sum decerned for to be paid by weekly, monthly, or quarterly instalments,[1] and decree may be given for sums to become due for a period not exceeding twelve months.[2] Where payment by instalments is allowed, the indulgence is forfeited if the defender allows one instalment to run into another unpaid, but to entail such forfeiture the second instalment must be due and exigible.[3] Caution for the sum sued for cannot be ordered.[4] The expenses which may be awarded are limited by Statute,[5] and the fees are regulated by the Act of Sederunt of 10th April 1908. As the attendance of agents is now permissible, it would seem necessarily to follow not only that their fees for attendance may be allowed, but that where their employment is reasonably necessary the party who employs an agent is entitled to his fee, even though the case is settled before calling.[6] An agent of a party may, on payment of a fee of one shilling, obtain from the Clerk of Court an extract of the decree to the extent of his interest therein,[7] and the Sheriff may, if he see fit, decern for the expenses in the agent's name.[7] Second or further extracts of the decree are competent.[8]

### III. Diligence upon Decree

**Extract.**—The form of extract is provided by the Statute, and it is written or printed on the summons,[9] or, in the case of second or further extracts, on a separate piece of paper.[10] It contains a warrant for instant execution by arrestment, and for execution by poinding and sale, and by imprisonment (where competent) after ten free days (without any charge) if the defender have been personally present at the pronouncing of judgment, or after a charge of ten free days if he has not been so present.[11]

[1] Act of 1837, s. 18; *see* Friedlander & Co. *v.* Hutton, 1902, 18 Sh. Ct. Reps. 138.

[2] Act of 1889, s. 9.

[3] Reid *v.* Wilkie, Guthrie's Sel. Ca. i. 420.

[4] Paterson *v.* Paterson's Trs., 1872, 44 J. 381.

[5] Act of 1837, ss. 13, 32.

[6] A. S. 10th April 1908, chap. vii. s. 1.

[7] Act of 1889, s. 12.

[8] Act, s. 47.

[9] Act of 1837, Sch. A, No. 7.

[10] Act, s. 47.

[11] Act of 1837, s. 13; Act of 1889, s. 7; Shiell *v.* Mossman, 1871, 10 M. 58.

**Charge.**—The charge, where necessary, must be of ten freedays,[1] and may be executed by an officer without a witness.[2] Where the place of execution is more than twelve miles distant from the seat of the Court where decree was granted, the charge may be given in the manner prescribed by the Citation Act of 1882, that is, by post.[3] As, however, that Act applies to the execution of citation, some difficulty may be experienced in applying its provisions to the case of a charge. In the case of citation under that Act, the induciæ run from twenty-four hours after the time of posting, and if the terms of the Act are applied literally, it would follow that if the debtor by any chance did not receive the charge till after the lapse of a longer period than twenty-four hours from the date of posting, he would not have the ten free days statutorily necessary. In the case of a company, corporation, firm, etc., the charge may be given under their nominate or descriptive name at their principal place of business (which includes the office or place of business of the clerk or secretary of any board or corporation), or, where such place of business is furth of Scotland, at any place of business in Scotland.[4] A charge expires after the lapse of a year.[5] The warrant does not authorise inhibition.[6] Where the decree has been assigned, a minute by the assignee may be indorsed on it, and presented to the Sheriff-Clerk, in terms of the Debtors' Act, 1838, and authority will then be given to the assignee to proceed with the diligence in terms of it, as in the case of an ordinary action; the Act does not, however, warrant carrying out the poinding by sale.[7]

**Execution beyond Jurisdiction.**—The warrant may be executed by any Sheriff-officer of any county without the necessity of any indorsation or warrant of concurrence.[8] The decree may be enforced in England or Ireland under the provisions of the Inferior Courts' Judgments Extension Act, 1882, in the same way and to the same extent as in the case of ordinary actions.[9]

**Poinding and Sale.**—After the expiry of the charge, or of the ten days when a charge is unnecessary, the debtor's effects may be poinded in a summary way by an officer, after they have been

[1] Act of 1837, s. 13; Act of 1889, s. 7; Shiell *v.* Mossman, 1871, 10 M. 58.
[2] Act of 1889, s. 11.
[3] Act, s. 49.
[4] Act, Rule 151.
[5] Act of 1837, s. 13.
[6] Lamont *v.* Lorimer, 1867, 6 M. 84.
[7] Debtors' Act, 1838, s. 12; Act of 1889, s. 5.
[8] Act of 1889, s. 11.
[9] Judgments Ext. Act, 1882, ss. 3, 10; *see ante.*

appraised on oath[1] by two persons, who may also be witnesses to the poinding. The decree includes a warrant to open shut and lock-fast places.[2] An inventory of the effects poinded is given to the person in whose custody they are, and the sale is carried out not less than forty-eight hours thereafter, between eleven and three o'clock, and after two hours' notice by the crier,[3] at the town cross or most public place nearest to the place of sale.[4] The Sheriff may, by general direction or special order, alter the hour or place for the sale, or appoint a longer or different kind of notice to be given. Any surplus, after paying the amount in the decree and the statutory expenses of the poinding and sale, is returned to the owner, or consigned with the Sheriff-Clerk if he cannot be found. Where the goods are not sold, they are delivered to the owner at the appraised value to the extent of the debt and expenses, with the expenses of the poinding and sale. In every case, either of sale or delivery, a report of the proceedings must be made to the Sheriff-Clerk within eight days after the day fixed for the sale. Where no sale or delivery takes place, the Statute does not require, nor is it the practice to make, a report of the poinding.[5]

*Breach of Poinding* by any person who secretes, carries off, or intromits with any poinded effects *in fraudem* of the poinding creditor, may be punished summarily by fine or imprisonment as for contempt of Court, either at the instance of a private party, with or without the concurrence of the Fiscal, or of the Fiscal, or *ex proprio motu* of the Sheriff, in addition to the ordinary civil liability of such person.[5]

**Arrestment in Execution** proceeds as in the case of a decree in the ordinary Court, the same things being liable to arrestment. The arrestment, like that on the dependence, falls in three months, unless renewed or followed by furthcoming and multiplepoinding.[6]

## IV. Special Forms of Action

**Furthcoming.**—The action of furthcoming following upon an arrestment, either in security or on the decree, is competent in the

[1] Act of 1837, Sch. G; Le Conte *v.* Douglas, 1880, 8 R. 175.

[2] Act of 1889, s. 7.

[3] *See* Gray *v.* Smart, 1892, 19 R. 692.

[4] Act of 1837, s. 20, Sch. G.

[5] Act of 1837, s. 20; *see* Dickson *v.* Bryan, 1889, 16 R. 673; Thomson *v.* Wood, *and* Perritt *v.* Bell, 1896, 12 Sh. Ct. Reps. 241, 327.

[6] Act of 1837, s. 6, Sch. (A) 7.

Small Debt Court where the sum sought to be recovered under the furthcoming does not exceed £20, exclusive of expenses and fees of extract, and where the funds or subject *in medio* is situated within the jurisdiction, or the holder of the fund is subject to the jurisdiction of the Court, even though the common debtor may not reside in either Sheriffdom.[1] The arrestee and the common debtor are summoned, according to the form in Schedule D of the Act of 1837, to appear at the Court not sooner than six days after citation. Should the common debtor not be resident within the county in which the action is brought, the diet of appearance is not sooner than the twelfth day. The arrestee and the common debtor must be cited for the same Court day. By bringing the action in the Small Debt Court, the pursuer is not held to have restricted the debt due by the common debtor to the amount sued for in the action.[2] Where a sale of goods or effects arrested is ordered by the Sheriff, the course of proceeding to be followed is the same as in the case of poinding and sale.[3] In other respects the action is simply an ordinary action of furthcoming, heard and determined in the summary manner provided for actions in the Small Debt Court. The expenses of bringing the action are to be deemed part of the arrester's claim, which may be made good out of the arrested fund or subject.[4]

**Multiplepoinding.**—A summons of multiplepoinding may be raised in the Small Debt Court in a case where a person holds a fund or subject which does not exceed the value of £20, and which is claimed by more than one person.[5] The summons may be raised by the holder of the fund, or by a claimant in the Sheriffdom where the fund or subject *in medio* is situated, or in the jurisdiction to which either the arrestee or holder of the fund is subject, although the common debtor may not reside within either Sheriffdom. The party raising the action must set forth who is the real raiser. The Sheriff may allow the real raiser his expenses perferably out of the fund *in medio*.[6] The summons is in the form of Schedule E annexed to the Act of 1837. The parties, other than the raiser, who may be the holder of the fund or one of the claimants, are cited in the manner directed to be followed in actions of furthcoming under the

[1] Act, s. 6 (g), and Rules 128, 129.
[2] Act of 1837, s. 9.
[3] *Ibid.*, s. 20.
[4] Act, Rule 129.
[5] Act of 1837, s. 10.
[6] Act, Rules 128, 129.

Act of 1837. If the Sheriff thinks that this has not secured sufficient intimation of the action, he may order such further intimation or publication as he may think proper, by advertisement in any newspaper or otherwise. In order that all parties may have an opportunity of lodging their claims, no judgment preferring any party to the fund *in medio* can be pronounced at the first calling of the case. The claims, when lodged, must be in the form provided by Schedule E of the Act of 1837, and the case is thereafter tried and determined like any ordinary action in the Small Debt Court.

**Sequestration for Rent.**—Sequestration for recovery of rent is competent in the Small Debt Court provided the rent or the balance of rent sued for does not exceed £20, and may be for rent past due or applied for *currente termino* or in security.[1] The form of summons and warrant of sequestration is given in the Act of 1837, Schedule B. The officer, when he executes the warrants, gets the effects appraised by two persons, who may also be witnesses to the sequestration, and an inventory of the effects appraised must be left with the tenant, along with the citation. The execution of citation, with the appraisement, must be returned to the Clerk within three days. The tenant is cited to appear not sooner than the sixth day after service. The summons contains a warrant to secure the effects if need be till the further orders of the Court. Power to open lockfast places is implied in all Small Debt warrants and decrees.[2] Should the tenant improperly remove any of the effects, warrant may be granted to carry them back, but the warrant will be granted only on special cause shown.[3] A minute, which must state circumstances sufficient to show improper removal, craving such warrant, must be endorsed on the summons. The minute should be intimated to the defender, and also to the person in whose custody the effects are.[4] On hearing the application the Sheriff may either recall the sequestration in whole or in part if improper, or if the action is one for rent past due, give decree for the rent found due and grant warrant for sale of the effects. If the sequestration is in security, it is usual to continue the case till after the date at which payment of the rent is due, to give an opportunity of payment. The sale is carried out in like manner as in the case of pointed

[1] Act of 1837, s. 5 ; Act, s. 43.
[2] Act of 1889, s. 7.
[3] Gray *v.* Weir, 1891, 19 R. 25.
[4] Johnston *v.* Young, 1890, 18 R. (J.) 6 ; M'Laughlin *v.* Reilly, 1892, 20 R. 41.

effects.[1] All sequestrations must be registered.[2] If after sequestration the tenant pays the rent claimed and the expenses, or consigns the rent, with £2 to cover expenses, in the hands of the Sheriff-Clerk, sequestration is *ipso facto* recalled. In the one case the Clerk writes "payment made" on the back of the warrant. In the other, he writes the words "consignation made," and the fact is intimated to the sequestrating creditor by an officer of Court. In both cases the Sheriff-Clerk must sign the writing.[3] The consignation must be made in terms of the Act, *i.e.* after sequestration,[4] and must include the £2 for expenses. Where all the conditions of section 5 of the Act of 1837 have been complied with, a landlord sequestrating for rent is entitled to insist on payment of expenses as a condition of the recall of the sequestration.[5] And if the Sheriff grants decree for payment of the rent he cannot refuse to grant warrant to sell the sequestrated effects.[6]

**Ejection.**—Where a decree for rent has been obtained in the Small Debt Court, and a sale under the decree of the tenant's effects ordered (whether the sale be carried out or not), and the officer charged with executing, or who executed the sale, reports to the Sheriff that the premises for which rent is owing have been displenished, the landlord may obtain a warrant to eject the tenant and re-let the premises. Notice of the diet at which the application for the warrant to eject is to be heard must be given to the tenant at least forty-eight hours beforehand, and may be given by registered letter addressed to the tenant's last known address. After hearing the application, the Sheriff may pronounce such order as to ejection, reletting, security, expenses, or otherwise as he shall think just. Where warrant to relet is granted, the rent accruing thereafter is not exigible from the tenant, except for such period as he may continue to occupy the premises.[7]

**Summary Removings**, under the provisions of the Act of 1907, have been dealt with in the part relating to ordinary actions. The action is not properly a Small Debt action, but one to which the forms in use in the Small Debt Court apply.

**Action for Delivery.**—Actions for the delivery of corporeal

[1] Act of 1837, s. 20.
[2] 30 & 31 Vict. c. 42, ss. 2, 7.
[3] Act of 1837, s. 5.
[4] Alexander *v.* Campbell's Trs., 1903, 5 F. 634.
[5] Renfrew *v.* Hall, 1901, 4 F. (J.) 27; Stalker *v.* Sommerville, 1901, 4 F. (J.) 31.
[6] Clarke *v.* Lowe, 1900, 2 F. (J.) 49.
[7] Act of 1889, s. 6.

moveables in cases where a party claims to be owner, or to be entitled to the possession of any corporeal moveables of a value not exceeding £20, and which are wrongfully withheld, are competent.[1] The value of the articles must be proved to the satisfaction of the Sheriff, and a list of them is annexed to the summons.[2] If delivery of the subjects has become impossible, or if their value be alternately concluded for, the Sheriff may decern for their value to the extent of £20.[2] Under this section an action for delivery of a writ has been held competent.[3] And in order to decide the question of delivery the Sheriff may incidentally decide the question of the ownership of the articles demanded,[4] the decree in such a case, if contested, being *res judicata* as to the question of ownership.[5] Decrees for delivery are now enforcible by imprisonment under the warrant for execution contained in Schedule B of the Act of 1889.[6] But before the decree and warrant can be followed by imprisonment, there must be a lapse of ten free days from the date of the decree if the defender was present when decree was pronounced, or a charge of similar duration if he was not so present.[7] Where under a decree delivery of the articles has not been effected, it would seem to be incompetent to raise a second action concluding for their value.[8]

## V. Appeals

**Appeals Competent.**—No decree in the Small Debt Court is subject to review in any form, other than that provided by the Act of 1837.[9] But any person conceiving himself aggrieved by any decree given by any Sheriff, may bring the case by appeal before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary.[10]

Such appeal is competent only when founded on one or other of the following grounds: (1) Corruption or malice and oppression on the part of the Sheriff; (2) such deviations in point of form from

[1] Act of 1889, s. 2; Act, s. 42.
[2] Act of 1889, s. 2, Schs. A and B.
[3] Baird *v.* Refuge Assurance Co., 1890, 6 Sh. Ct. Reps. 187.
[4] Houston *v.* Milroy, 1903, 10 S.L.T. (J.) 229.
[5] Edwards *v.* Corrance, 1903, 19 Sh. Ct. Reps. 219.
[6] Act, s. 46.
[7] Act of 1837, s. 13.
[8] Ronald *v.* Sinclair, 1902, 18 Sh. Ct. Reps. 164.
[9] Act of 1837, s. 30.
[10] Act of 1837, s. 31.

the statutory enactments as the Court may think took place wilfully or have prevented substantial justice being done; and (3) incompetency, including defect of jurisdiction of the Sheriff. There is therefore no review upon the merits, whether the decision be wrong in point of fact either as regards the law or the facts involved.[1]

1. *Corruption or Malice* need not be personal malice, but may be conduct so grossly unjustifiable as to be equivalent to personal malice.[2]

2. *Deviations in point of Form* are such wilful departures from the statutory provisions as to result in a miscarriage of justice. The construction put upon the phrase by the Court can best be illustrated by examples. Thus, where a pursuer who had a claim against a railway company for damage done to his goods in the course of conveyance, sued the company in a Small Debt action, which did not specify the ground of action, but referred to an account which bore *ex facie* to be for goods sold, the case being stated to and disposed of by the Sheriff as a claim for reparation, the decree was set aside.[3] So, where a pursuer sued for the value of a sewing machine which had been wrongfully sold by defender, and was awarded a sum by way of damages, the decree was set aside.[4] Again, where a tradesman obtained decree for the amount of an account, the last item in which was dated thirteen years before the action was raised, the defender appealed to the Circuit Court, alleging in substance that the Sheriff had disregarded the Act introducing the triennial prescription, having given decree without his (the defender's) writ or oath, and without any admission of resting owing from him, the appeal was sustained on the ground of deviation in form.[5] Again, where an action was brought upon a policy in a benefit society, and decree given for the amount sued for without the policy or a copy of it being produced, when its terms were in dispute, it was held that the Sheriff-Substitute, not having had the policy before him, had deviated in point of form and that appeal was competent. The Court recalled the judgment and remitted to the Sheriff to recover the policy, and thereafter to

[1] *See* Scott *v.* Macdonald, 1885, 23 S.L.R. 273.

[2] Philip *v.* Forfar Bldg. Invest. Co., 1868, 41 J. 1, *per* Ld. Deas.

[3] G. & S.-W. Rly. *v.* Wilson, 1855, 2 Irv. 162.

[4] Singer Mfg. Co. *v.* Beale & Mactavish, 1905, 8 F. (J.) 29.

[5] Murray *v.* Mackenzie, 1869, 41 J. 394; Gunn *v.* Taylor, 1873, 2 Coup. 491.

re-hear the case.[1] Where a Sheriff granted decree subject to taxation, and thereafter the Sheriff-Clerk, who was himself the pursuer, issued extract decree without the Sheriff having seen the report, the Court sustained an appeal.[2] And where a party, thinking himself aggrieved by an assessment, neglected to adopt the statutory remedy, it was held that in an action raised to recover such assessment, appeal was competent on the ground that the Sheriff had allowed evidence to be adduced to contradict the Valuation Roll under which the assessment was imposed.[3] And where a person raised three Small Debt actions for the same debt, the first and second of which were dismissed, the third being also dismissed because the Sheriff, on the ground that "after hearing the parties had come to the conclusion that there should be an end of strife, and that it was not desirable to open the case for the third time," refused to hear the parties, appeal was held competent.[4] Again, where in a Small Debt action of sequestration for payment of rent, a Sheriff gave decree, but refused to grant warrant to sell, the Court sustained an appeal at the landlord's instance, on the ground that there had been a deviation in point of form from the statutory enactment.[5] And appeal was held competent where the Sheriff refused to allow proof, and decided the case on a remit.[6] Refusal on the part of the Sheriff to hear necessary and competent evidence, affords a good ground of appeal.[7] Thus, where the Sheriff decided the case without taking a proof,[8] or refused to hear evidence tendered by a defender who had given a qualified admission,[9] appeal was held competent. If, however, the admission of proof is a matter for the Sheriff's decision, appeal is incompetent.[9] Thus, an appeal against the judgment of the Sheriff allowing a parole proof of a verbal agreement and subsequent actings, by which the terms of a written discharge were sought to be modified and explained, was dismissed on the ground that the question whether such proof should have been allowed was one of law for the determination of the Sheriff, and did

[1] Maxwell *v.* Bell, 1886, 24 S.L.R. 12.
[2] Guthrie *v.* M'William, 1856, 2 Irv. 476.
[3] M'Lachlan *v.* Tennant, 1871, 43 J. 390.
[4] Gow & Son *v.* M'Ewan, 1897, 34 S.L.R. 421.
[5] Clarke *v.* Lowe, 1900, 2 F. (J.) 49.
[6] Carmichael *v.* M'Intyre, 1904, 4 F. 48; Donald *v.* Paterson, 1904, 42 S.L.R. 175.
[7] Bryce *v.* Spence, 1885, 12 R. (J.) 43; Renfrew *v.* Hall, 1901, 4 F. (J.) 27.
[8] Sinclair Bros. *v.* Reid, 1894, 22 R. (J.) 12.
[9] Gordon *v.* Mulholland, 1891, 18 R. (J.) 18; Cowie *v.* Paterson, 1904, 7 F. (J.) 68.

not afford a statutory ground of appeal.[1] So an appeal on the ground that no evidence had been led, and that the Sheriff had erroneously repelled a plea of prescription, was held incompetent.[2] And where, on an account which was partly for spirits, the defender admitted part of the debt, and the Sheriff gave decree for the whole sum, the defender appealed and alleged that the Sheriff had given decree without hearing parties or giving an opportunity for explanation, pleading that part of the account was struck at by the Tippling Act, but the appeal was dismissed.[3] And appeals were refused where the Sheriff refused to hear evidence on the ground that it was irrelevant,[4] and because the Sheriff had erroneously repelled a plea of prescription.[5] In an appeal upon the ground, *inter alia*, that in the summons no account was given of the origin of the cause of action, otherwise than by reference to an account endorsed on the summons but not forming part of it, the Court held that there was no relevant ground of appeal.[6] And where, in an action to recover payment of an account for medical attendance, the demand being stated in slump, without any detail of the number of the visits or charge for each, the Sheriff gave decree, the Court held there was no real deviation misleading or creating injustice, such as to justify an appeal.[7]

3. *Incompetency and Defects of Jurisdiction.*—The meaning of this phrase can best be gathered from a review of the decisions of the Court. Thus, an action which raises, however indirectly, a question of *status*, is incompetent in the Sheriff Court, and the decision in such a case is subject to review.[8] And where decree was pronounced against the trustee on a sequestrated estate, in an action at the instance of a collector of poor rates for poor rates incurred by the bankrupt before sequestration, it was held that the action was incompetent, the proper course being for the collector to lodge a claim with the trustee, and appeal if it were rejected, and an appeal was therefore sustained.[9] Again, where a defender having objected

[1] Hare *v.* M'Nicol, 1871, 43 J. 389; Beattie *v.* Gemmel, 1862, 34 J. 213.

[2] Buchanan *v.* Glasgow Corporation Water Works Commissioners, 1862, 4 Irv. 225.

[3] Nisbet *v.* Cameron, 1873, 10 S.L.R. 458.

[4] Brown *v.* Edin. House Proprs. Co. Ld., 1902, 40 S.L.R. (J.) 28.

[5] Buchanan *v.* Glasgow Corporn. Water Works Comrs., 1862, 4 Irv. 225.

[6] Aitken *v.* Learmont, 1855, 2 Irv. 156.

[7] Mowat *v.* Martine, 1856, 2 Irv. 435; Birrell *v.* Buchanan, 1871, 43 J. 388.

[8] Strang *v.* Strang, 1882, 4 Coup. 563.

[9] Dickie's Trs. *v.* White, 1871, 44 J. 1.

to the Sheriff-Substitute's jurisdiction upon the ground that she had no residence within the county, and he, after a proof, repelled her objection and decerned against her, it was held that the defender was entitled to appeal; and the case was remitted to the Sheriff to inquire into the facts and report.[1] An appeal which raises only a question decided on the merits is incompetent.[2] Thus, where a decree was appealed on the ground that the defence was that the case had been previously disposed of under a remit to which the Sheriff refused to give effect, it was held that the appeal was upon the merits, and therefore incompetent.[3] And where a member of a trade society obtained decree against the society for funeral expenses, it was held that an appeal by the society on the ground of "no jurisdiction" was incompetent.[4] In an appeal against a decision in an action for recovery of a sum due as premiums paid on a policy of insurance, it was held that though the action raised the question of the validity of the policy it was not incompetent, and that therefore appeal was excluded.[5] In a case in which Police Commissioners sued a householder for the cost of laying pavement opposite his house, the defender pleaded that the work was badly done, but failed to appeal in terms of the Burgh Police Act. The Sheriff allowed a proof, and after hearing evidence assoilzied the defender, and the Court dismissed an appeal against his judgment as incompetent.[6] Where in a case the Sheriff had disregarded or failed to give effect to a local Act, the Court held, on an appeal against his judgment, that, assuming the Sheriff had erred, his error was committed in deciding the merits of the case, and dismissed the appeal.[7] So, even where in deciding a case the inadequacy of the reasons for the judgment are manifest, the Court will not sustain an appeal if in pronouncing decree the Sheriff has applied his mind to the question in dispute,[8] and for a similar reason no mere mistake in the law applicable to the case on the part of the Sheriff will render an appeal competent.[9] Thus, in cases where the Sheriff

[1] Russell & Co. *v.* Murray, 1892, 19 R. (J.) 61; *see* Roberts *v.* Provincial Homes Invest. Co., 1907, S.C. (J.) 7.

[2] Scott *v.* Macdonald, 1885, 23 S.L.R. 273; Wilson *v.* Scott, 1890, 18 R. 233.

[3] Wilson *v.* Glasgow Tramways Co., 1878, 5 R. 981.

[4] Allison *v.* Balmain, 1882, 10 R. (J.) 12.

[5] Provincial Homes Invest. Co. *v.* Leven, 1904, 6 F. (J.) 62.

[6] Crieff Mags. *v.* Young, 1906, 8 F. (J.) 48.

[7] Mossan *v.* Brash, 1872, 45 J. 5.

[8] Portpatrick, etc., Joint Committee *v.* Sprott, 1898, 25 R. (J.) 71.

[9] Strathmore Auction Co. *v.* Miller, 1906, 8 F. (J.) 71.

dismissed an action on the ground that it was premature,[1] held a person to be a pauper who was not on the Poor's Roll,[2] and dismissed the action on the ground that defender had not been properly cited,[3] appeal was held to be incompetent.

**Procedure in Appeal.**—The appeal must be either to the next Circuit Court,[4] or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh.[5] The procedure is regulated by the Heritable Jurisdiction Act, 1746, the Act of 1837, s. 31, and the Act of Sederunt, 1839, ss. 132, 133. The appeal may be taken either in open Court at the time of pronouncing judgment, or within ten days thereafter, and the appellant lodges a minute of appeal with the Sheriff-Clerk, and serves a copy on the respondent or his agent in the case. Productions in the case, and the names of witnesses examined, must be marked by the Sheriff if they are to be referred to in the appeal. The witnesses' names must be marked on the record copy of the summons. The appeal must also be served upon the Sheriff, "in case the appeal shall contain any conclusion against him by way of censure or reparation for damages for alleged wilful injustice, oppression, or other malversation." The Sheriff should not, however, be called as a party.[6] No sist or stay of the process and decree, and no certificate of appeal, can be issued by the Sheriff-Clerk except upon consignation of the whole sum, if any, decerned for by the decree and expenses, if any, and security found for the whole expenses which may be incurred and found due under the appeal. The bond, with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any, which may be by that Court awarded, must be lodged at the time of entering the appeal, or within ten days from the time judgment was pronounced. The Sheriff-Clerk is answerable for the sufficiency of the cautioner. If no bond is lodged, the Clerk may give out the extract. The service of the appeal must not only be within the ten days of judgment, but must be made to the next Circuit Court which shall happen to be held fifteen days at least after such service. The Circuit Court may send (or "certify") the case to the High Court

[1] Ferguson *v.* Mackie, 1878, 4 Coup. 5; Findlay *v.* Crabb, 1886, 13 R. (J.) 53.

[2] Paterson *v.* Mackay, 1872, 45 J. 5.

[3] Rennie *v.* N. B. Rly. Co., 1874, 1 R. (J.) 22; Atherton *v.* Moffat, 1843, 1 Broun, 524.

[4] Sinclair *v.* Hollis, 1881, 9 R. (J.) 1; Davidson *v.* Gray, 1844, 2 Broun, 9.

[5] Act of 1837, s. 31.

[6] Paterson & Sons *v.* Robinson, 1895, 22 R. (J.) 45.

of Justiciary, and either of these Courts may remit the case to the Sheriff, with instructions,[1] or to the Court of Session,[2] for disposal. The Court may modify expenses or allow them as taxed.[3]

## VI. Review by Suspension or Reduction

**When Competent.**—The finality clause[4] of the Act of 1837, which prohibits any form of review other than that provided in section 31, does not prevent review by the Court of Session, in the form of reduction, of a decree obtained in the Small Debt Court, or suspension of a charge or threatened charge upon such decree, where the proceedings leading to or connected with the pronouncing of the decree are not merely essentially tainted with illegality, but are fundamentally null and illegal, as, for example, where the summons is served upon the wrong person,[5] or is signed by a Sheriff-Clerk who is himself the pursuer,[6] or has acted as an agent of one of the parties.[7] But a distinction is drawn between the fundamental illegality of the decree itself, and an illegality connected with something which happens after the decree is granted. The illegality must be such as leads or is incidental to the granting of the decree, and reduction is incompetent on the ground of irregularities in the citation,[8] or of admitted error in the amount of the sum decerned for,[9] or of irregularities in the taking of the proof.[10] So where, in a suspension of diligence upon a decree in absence, the suspender offered to prove that before decree a portion of the money had been accepted as payment in full, it was held that the remedy was by a re-hearing (which had not been applied for), and that it was not competent to seek redress by suspension.[11] And where a suspender alleged that the extract contained expenses which had not been awarded by the Sheriff, review by suspension was held incompetent.[12] But in a case in which it was alleged that the extract

[1] Glass *v.* Laughlin, 1876, 4 R. 108; Spence *v.* Bryce, 1885, 12 R. (J.) 43; Maxwell *v.* Bell, 1886, 24 S.L.R. 12; Murray *v.* Russell, 1892, 19 R. (J.) 61.

[2] Burrell *v.* Foster, 1868, 1 Coup. 103.

[3] Dalgleish & Kerr *v.* Anderson, 1882, 5 Coup. 221.

[4] Act of 1837, s. 30.

[5] Brown *v.* Rodger, 1884, 12 R. 340.

[6] Smith *v.* Manson, 1871, 9 M. 492.

[7] Gray *v.* Hardie, 1888, 1 White, 561.

[8] Lennon *v.* Tully, 1879, 6 R. 1253; Christie *v.* Hoseason, 1898, 6 S.L.T. 123.

[9] Wilson *v.* Scott, 1890, 18 R. 233.

[10] Robertson *v.* Pringle, 1887, 14 R. 474.

[11] Turnbull & Co. *v* Russell, 1851, 14 D. 45.

[12] Tait & Crichton *v.* Anderson, 1905, 12 S.L.T. 825.

had been altered by the Sheriff-Clerk several days after extract, so as to cover a larger sum than was decerned for, reduction of the vitiated extract of the decree was granted.[1] Similarly, the finality clause has been held not to bar a suspension where a charge had not been given before imprisonment, the warrant erroneously bearing "after a lapse" instead of "after a charge,"[2] or where a charge had been given to a bankrupt after his discharge on a composition.[3] It is not, however, a ground of suspension that the extract does not truly represent the decree which was pronounced, because, so far as review is concerned, the diligence following on the decree and the decree itself are on all fours.[4] It is not a ground of suspension that the sum decerned for was paid before decree.[5] Nor can a charge upon a bill be suspended where decree for the contents of the bill has been granted.[6] Nor is an interdict competent against diligence on a decree on the ground that the summons contained a misnomer in the Christian name of the defender, the summons having been served personally and the debt having been admittedly due.[7] Where a defender, alleging that his wife had appeared without his authority, sought to reduce the decree granted on the ground that it had really been in absence and not *in foro*, the action was held incompetent.[8] For similar reasons, claims of damages in respect of irregularities in the citation and decree,[9] or for breaking open lockfast places without a warrant,[10] are incompetent. And claims of damages for having taken decree wrongfully, as where part of the sum decerned for had been paid,[11] are equally incompetent.

[1] Murchie *v.* Fairbairn, 1863, 1 M. 900.

[2] Sheill *v.* Mossman, 1871, 10 M. 58.

[3] Samuel *v.* Mackenzie, 1876, 4 R. 187.

[4] *See* Wilson *v.* Scott, *sup.*, per Ld. Pres. Inglis; Beveridge *v.* Macfarlane & Co., 1906, 14 S.L.T. 169.

[5] Curdie *v.* Hay, 1902, 10 S.L.T. 435.

[6] Clark *v.* Davidson, 1893, 1 S.L.T. 141.

[7] Spalding *v.* Valentine, 1883, 10 R. 1092; Cruikshanks *v.* Gow & Sons, 1888, 15 R. 326.

[8] Riach *v.* Wallace, 1899, 2 F. 149; Gray *v.* Macintosh, 1906, 14 S.L.T. 403.

[9] MacLean *v.* Mackenzie, 1895, 3 S.L.T. 142.

[10] Scott *v.* Young, 1897, 4 S.L.T. 324.

[11] Jackson *v.* Lillie, 1902, 10 S.L.T. 448; Reid *v.* Gow, 1903, 10 S.L.T. 606; Gray *v.* Smart, 1892, 19 R. 692; Pollock *v.* Bremner (Goodwin's Trs.), 1898, 25 R. 1051; *see* Macdonald *v.* Grant, 1903, 11 S.L.T. 575.

# APPENDIX

# APPENDIX

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## I. SHERIFF COURTS (SCOTLAND) ACT, 1907

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## CHAPTER LI

*An Act to regulate and amend the Laws and practice relating to the civil procedure in Sheriff Courts in Scotland, and for other purposes.*

[28*th August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PRELIMINARY

1. SHORT TITLE.—This Act may be cited for all purposes as the Sheriff Courts (Scotland) Act, 1907.

2. COMMENCEMENT.—Unless otherwise specially enacted, this Act shall come into operation on the first day of January one thousand nine hundred and eight.

3. INTERPRETATION.—In construing this Act (unless where the context is repugnant to such construction)—

(*a*) "Sheriff" includes sheriff-substitute;

(*b*) "Tenant" includes sub-tenant;

(*c*) "Lease" includes sub-lease;

(*d*) "Action" includes every civil proceeding competent in the ordinary Sheriff Court;

(*e*) "Person" includes company, corporation, or association and firm of any description nominate or descripive, or any Board corporate or unincorporate;

(*f*) "Sheriff-clerk" includes sheriff-clerk depute;

(*g*) "Agent" means a law agent enrolled in terms of the Law Agents (Scotland) Act, 1873 (36 & 37 Vict. c. 63);

(*h*) "Final judgment" means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for;

(*i*) "Summary cause" includes—

(1) Actions (except applications under the Workmen's Compensation Act, and actions with conclusions *ad factum præstandum*) for payment of money exceeding twenty pounds, and exceeding fifty pounds, exclusive of interest and expenses;

(2) Actions of whatever kind (except applications under the Workmen's Compensation Act and actions under the Small Debt Acts), notwithstanding that the value may exceed fifty pounds, in which the parties consent to the action being treated as a summary cause;

(*j*) "Small Debt Acts" means and includes the Small Debt (Scotland) Acts, 1837 to 1889, and Acts explaining or amending the same;

(*k*) "Initial writ" means the statement of claim, petition, note of appeal, or other document by which the action is initiated;

(*l*) "Procurator-Fiscal" means procurator-fiscal in the Sheriff Court;

(*m*) "Workmen's Compensation Act" means the Workmen's Compensation Act, 1906 (6 Edw. 7 c. 58), and any Acts explaining or amending the same;

(*n*) "Pursuer" means and includes any person making a claim or demand, or seeking any warrant or order competent in the Sheriff Court;

(*o*) "Defender" means and includes any person who is required to be called in any action;

(*p*) "Summary application" means and includes all applications of a summary nature brought under the common law jurisdiction of the sheriff, and all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the Sheriff Court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined.

### Jurisdiction

4. Jurisdiction.—The jurisdiction of the sheriffs, within their respective sheriffdoms, shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the sheriffs, provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff before whom such cause or proceeding may be raised, and provided also that it shall not be competent to the sheriff to try any crime committed on the seas which it would not be competent for him to try if the crime had

been committed on land: Provided always that where sheriffdoms are separated by a river, firth, or estuary, the sheriffs on either side shall have concurrent jurisdictions over the intervening space occupied by water.

5. Extension of Jurisdiction.—Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland, and such jurisdiction shall extend to and include—

(1) Actions of declarator (except declarators of marriage or nullity of marriage, and actions the direct or main object of which is to determine the personal status of individuals):

(2) Actions of aliment, or of separation and aliment, and for regulating the custody of children:

(3) Actions of division of commonty and of division or division and sale of common property, in which cases the Act of 1695 concerning the division of commonties shall be read and construed as if it conferred jurisdiction upon the Sheriff Court in the same manner as upon the Court of Session:

(4) Actions relating to questions of heritable right or title (except actions of adjudication save in so far as now competent and actions of reduction), including all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant:

(5) Suspension of charges or threatened charges upon the decrees of court granted by the sheriff or upon decrees of registration proceeding upon bonds, bills, contracts or other obligations registered in the books of the Sheriff Court, the books of Council and Session, or any others competent where the debt, exclusive of interest and expenses, does not exceed fifty pounds:

Provided that actions relating to questions of heritable right or title, including irritancy and removing, or to division of commonty or division or division and sale of common property shall, if raised in the Sheriff Court, be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall in such action be subject to that jurisdiction: Provided also that it shall be competent for either party at the closing of the record or within six days thereafter to require the cause to be remitted to the Court of Session in the case of actions—

(*a*) Relating to questions of heritable right and title where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds in value:

(*b*) Relating to the right of succession to moveables where the value of the subject in dispute exceeds one thousand pounds:

(*c*) Relating to division of commonty or division or division and sale of common property where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds value:

Provided also, that on cause shown or *ex proprio motu* the sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children.

6. Action Competent in Sheriff Court.—Any action competent in the Sheriff Court may be brought within the jurisdiction of the sheriff—

(*a*) Where the defender (or where there are several defenders where one of them) resides within the jurisdiction, or, having resided there for at least forty days immediately prior to the raising of the

action has ceased to reside there for less than forty days, and whose present residence in Scotland is unknown :

(*b*) Where the defender carries on business and has a place of business within the sheriffdom, and is cited either personally or at such place of business :

(*c*) Where the defender is a person not otherwise subject to the jurisdiction of the courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction :

(*d*) Where the defender is the owner or part owner or tenant or joint tenant, whether individually or as a trustee of heritable property within the jurisdiction, and the action relates to such property or to his interest therein :

(*e*) Where the action is for interdict against an alleged wrong being committed or threatened to be committed within the jurisdiction :

(*f*) Where the action relates to a contract the place of execution or performance of which is within the jurisdiction, and the defender is personally cited there :

(*g*) Where in an action of furthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction ; or the arrestee or holder of the fund is subject to the jurisdiction of the court :

(*h*) Where the party sued is the pursuer in any action pending within the jurisdiction against the party suing :

(*i*) Where the action arises out of the delict of the defender within the jurisdiction, and he is personally cited there :

(*j*) Where the defender prorogates the jurisdiction of the court.

7. Privative Jurisdiction in Causes under £50 Value.—Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding fifty pounds in value, exclusive of interest and expenses competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session : Provided that in actions *ad factum præstandum*, where the value of the cause is not disclosed, the same shall be deemed to exceed fifty pounds, unless in the course of the cause the sheriff shall determine, as after provided, that the value thereof is less than fifty pounds : Provided also that nothing herein contained shall affect any right of appeal competent under any Act of Parliament in force for the time being.

8. Summary Cause Procedure and Appeal.—In a summary cause the sheriff shall order such procedure as he thinks requisite, and (without a record of the evidence, unless on the motion of either party the sheriff shall order that the evidence be recorded) shall dispose of the cause without delay by interlocutor containing findings in fact and in law. Where the evidence has been recorded the judgment of the sheriff-substitute upon fact and law may in ordinary form be brought under review of the sheriff, but where the evidence has not been recorded, the findings in law only shall be subject to review. In a summary cause, if the sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a division of the Court of Session on such questions of law, but otherwise the judgment of the sheriff shall be final.

9. Value of Cause. How Determined.—The sheriff before whom the cause depends shall (in such way as he may think expedient) inquire into and determine the value thereof for the purposes of this Act, and his determination shall be final as regards the competency of the action on the ground of value but not otherwise.

10. Privilege not to Exempt from Jurisdiction.—No person shall be exempt from the jurisdiction of the sheriff court on account of privilege by reason of being a member of the College of Justice.

### Sheriffs

11. Appointment of Sheriffs and Salaried Sheriffs-Substitute.—The right of appointing to the salaried offices of sheriff and salaried sheriff-substitute shall be vested in His Majesty, and shall be exercised on the recommendation of the Secretary for Scotland.

12. Qualification for Sheriff and Salaried Sheriff-Substitute.—Every person appointed to the office of sheriff shall be an advocate of five years' standing at least, or, if not an advocate, a sheriff-substitute of five years' standing at least; and every person appointed to the office of salaried sheriff-substitute shall be an advocate or a law agent within the meaning of the Law Agents (Scotland) Act, 1873 (36 & 37 Vict. c. 63): Provided always that such advocate or law agent shall be of not less than five years' standing in his profession.

13. Removal from Office of Sheriff and Salaried Sheriff-Substitute.—It shall be lawful for the Secretary of Scotland, upon a report prepared at his instance by the Lord President for the Court of Session and the Lord Justice-Clerk for the time being, declaring that a sheriff in Scotland is by reason of inability, neglect of duty, or misbehaviour unfit for his office, to issue an order for his removal from office: Provided always that such order shall lie before both Houses of Parliament for a period of four consecutive weeks while Parliament is sitting, and if either House of Parliament within that period resolve that such order ought not to take effect, the same shall be of no effect, but otherwise shall come into operation at the expiration of the said period. In this paragraph "sheriff" does not include "sheriff-substitute."

A salaried sheriff-substitute shall be removeable from his office by the Secretary for Scotland for inability or misbehaviour upon the report of the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

14. Salaries of Sheriffs and Sheriffs-Substitute.—It shall be lawful to grant to any sheriff or sheriff-substitute such salary as to the Treasury may seem meet, and every such salary shall be paid by four equal quarterly instalments, and shall be charged upon and be payable out of the Consolidated Fund.

15. Leave of Absence to Sheriff. — It shall be lawful for the Secretary for Scotland, on an application made by or on behalf of any sheriff for leave of absence on account of temporary illness or other reasonable cause, to grant such leave of absence for such period as he shall deem proper, and to appoint some other person who shall be a sheriff of some other sheriffdom, or an advocate of not less than five years' standing, to act as interim sheriff in the place and during the absence of such sheriff, and on such interim appointment being made to fix what proportion of the salary of the sheriff shall be paid to the interim sheriff, and to certify

the same in writing, and such certificate when presented in Exchequer to the King's and Lord Treasurer's Remembrancer shall be sufficient warrant for him for payment to such interim sheriff of the proportion of the sheriff's salary therein mentioned. A sheriff appointed to be interim sheriff under this section shall not by accepting such interim appointment vacate his office as sheriff. An interim sheriff appointed under this section shall have and exercise all the powers and privileges and perform all the duties of the sheriff, and his acts, orders, and judgments shall have the same force and effect as if done, made, or pronounced by the sheriff. In this section "sheriff" does not include sheriff-substitute.

16. Leave of Absence to Salaried Sheriff-Substitute.—In the event of any salaried sheriff-substitute, by reason of ill-health, being temporarily unable to discharge the duties of his office, it shall be lawful for the Secretary for Scotland on application being made to him by or on behalf of such sheriff-substitute, to appoint a person qualified to fill the office of sheriff-substitute to act *ad interim* in the place and during the absence of such sheriff-substitute, and on such interim appointment being made the Treasury may, on the recommendation of the Secretary for Scotland, allow such interim sheriff-substitute such remuneration as they think fit out of monies to be provided by Parliament.

17. Honorary Sheriff-Substitute. — The sheriff may by writing under his hand appoint such persons as he thinks proper to hold the office of honorary sheriff-substitute within his sheriffdom during his pleasure, and for whom he shall be answerable. An honorary sheriff-substitute, during the subsistence of his commission, shall be entitled to exercise the powers and duties appertaining to the office of sheriff-substitute. An honorary sheriff-substitute shall hold office, notwithstanding the death, resignation, or removal of the sheriff, until his commission shall be recalled by a succeeding sheriff. In this section "sheriff" does not include sheriff-substitute.

18. Courts to be held by Sheriffs in their Sheriffdoms.—Every sheriff shall, unless prevented by indisposition or other unavoidable cause, hold annually in his sheriffdom courts for the discharge of the judicial business of the sheriffdom; and such courts shall continue until the causes ready for trial or hearing when such courts commence shall be disposed of; and each sheriff shall give due notice of the times and places of such courts; and, unless otherwise prescribed, each sheriff shall, once in the year, go on the small debt circuit, in use to be held by the sheriff-substitute, and shall on such occasions, in addition to holding the small debt court, despatch as much of the ordinary business as may be ready for adjudication, or as time may permit; and each sheriff shall annually, within ten days after the twelfth day of November, make a return to the Secretary for Scotland of the number of courts and sittings held by him, and of the periods of holding each such court, in the immediately preceding year, stating the cause of absence in case the court hereinbefore directed shall not have been held by him in terms of this Act, provided that the above provisions shall not extend to the sheriffs of the Lothians and Peebles and of Lanarkshire: Provided always that it shall be lawful for the Secretary for Scotland to prescribe from time to time the number of courts to be held by the several sheriffs and the times and places for holding such courts, and also from time to time to prescribe the duties of the office of sheriff which such sheriffs respectively are required to perform personally. In this section "sheriff" does not include sheriff-substitute.

19. Secretary for Scotland to Regulate Number, Duties, and Residence of Salaried Sheriffs-Substitute. — It shall be lawful for the Secretary for Scotland from time to time to prescribe the number of salaried sheriffs-substitute of the several sheriffdoms, and the places at which such salaried sheriffs-substitute respectively are required generally to reside and to attend for the performance of their duties, the number of courts to be held by such sheriffs-substitute, the times and places of holding such courts, and the duties to be performed by such sheriffs-substitute; and it shall also be lawful for the Secretary for Scotland, if he shall think fit, to direct that the sheriff-substitute of one county shall perform the duties of sheriff-substitute in an adjacent county; and any such direction shall be equivalent in all respects to a commission to act in such adjacent county in favour of the sheriff-substitute so directed; and no salaried sheriff-substitute shall be absent from the sheriffdom for more than six weeks in any year nor for more than two weeks at any one time nor so as to interfere with the regular sittings of his court, without the special consent in writing of the sheriff, who shall be bound, in the event of his giving such consent, either to attend personally during the absence of such substitute, or to appoint another person qualified as in section twelve hereof to act as substitute in his stead.

20. Annuities to Sheriffs and Salaried Sheriffs-Substitute.—It shall be lawful for the Treasury, upon the recommendation of the Secretary for Scotland, to grant an annuity payable in like manner as the salaries to any person who has held, now holds, or may hereafter hold the office of sheriff or salaried sheriff-substitute whose period of service (notwithstanding that such service may not have been continuous and may have been in different sheriffdoms, and may have been partly as sheriff-substitute and partly as sheriff) has been not less than ten years. Provided always that such annuity shall not exceed one-third of the salary payable to such person in case the period of his service shall have been not less than ten years, and shall not exceed two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards: Provided also that (except as hereinafter provided) no such annuity shall be granted to any sheriff or sheriff-substitute unless the periods of his actual service shall, when taken together, extend to one or other of the periods of service before mentioned, and that in computing the amount of said annuity the emoluments drawn by him on an average of the five preceding years shall be held to constitute his salary: Provided also that no such annuity shall be granted unless such sheriff or sheriff-substitute shall have duly fulfilled the duties of his office during one of the periods before mentioned, and is from age or permanent infirmity disabled from the due exercise of his office, which facts shall be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being as having been established to their satisfaction: Provided also that if a sheriff is removed under section thirteen hereof before he has completed ten years' service, on the ground that he is by reason of inability unfit for his office, it shall be lawful for the Treasury to grant him an annuity of such amount and for such period as they shall consider just in all the circumstances, but in no case exceeding three-tenths of the salary payable to such sheriff, and any such annuity shall be charged upon and payable out of the same fund and in the same manner as annuities to sheriffs are paid and charged under the first section of the Public

Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94). In the last proviso of this section "sheriff" shall not include sheriff-substitute.

21. Disqualifications and Disabilities of Sheriffs and Salaried Sheriffs-Substitute.—It shall not be lawful for a sheriff to advise, plead, or otherwise act as an advocate before any of the King's Courts at Edinburgh, or at the Circuit Court, in any cause civil or criminal arising within or coming from his sheriffdom; and no sheriff or salaried sheriff-substitute shall be steward, chamberlain, factor, agent, or commissioner to any subject whatsoever, or shall exercise, or act in the employment, service, or office of such steward, chamberlain, factor, agent, or commissioner; and no sheriff or salaried sheriff-substitute shall be capable of being elected or of sitting or voting as a member of the House of Commons, nor shall he be entitled to vote at any election for any member of Parliament held within his sheriffdom; nor shall he act directly or indirectly as an agent for any candidate in any matter connected with, or preparatory to, any election for the county or burgh respectively in which he shall be sheriff or salaried sheriff-substitute; and it shall not be lawful for a salaried sheriff-substitute to engage in legal, banking, or other private practice or business, or to act directly or indirectly as a procurator before any court, or to be in partnership with any person so engaged or acting, nor shall such sheriff-substitute be appointed to any office, except such office as shall be by statute attached to the office of sheriff-substitute.

Any sheriff or salaried sheriff-substitute acting contrary to the provisions of this section shall be guilty of misbehaviour within the meaning of section thirteen of this Act.

### Procurators-Fiscal

22. Appointment of Procurator-Fiscal.—From and after the passing of this Act the right of appointing to the office of procurator-fiscal shall be vested in the Lord Advocate.

23. Removal of Procurator-Fiscal.—No person holding the office of procurator-fiscal at the passing of this Act, and receiving salary on that account, and no person who may be hereafter appointed to the office of procurator-fiscal, shall be removeable from office, except by the Secretary for Scotland, for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

24. Procurator-Fiscal may appoint Depute.—A procurator-fiscal may, with the consent of the Lord Advocate, grant a deputation to one or more fit persons, for whose actings he shall be responsible, to sign writs, to appear in court, and to conduct prosecutions and inquiries in his name and on his behalf. In the event of a vacancy in the office of procurator-fiscal, any depute or deputes so appointed shall have and discharge all the powers, privileges, and duties of a procurator-fiscal until such vacancy is filled up.

### Sessions

25. Sessions.—In each sheriff court there shall be held two sessions in the year, a winter and a summer session. The winter session shall extend from the first ordinary court day in October to the last ordinary court day in March. The sittings of the court may, at Christmas time, be suspended for a period not exceeding fifteen days. The summer session

shall extend from the first ordinary court day in May to the last ordinary court day in July.

26. Vacation Courts.—The sheriff shall, before the termination of each winter session, appoint at least one court day during the spring vacation for the dispatch of civil business, and before the termination of each summer session he shall in like manner appoint at least two court days during the autumn vacation for the same purpose. Any cause may proceed during vacation as during session, and in all causes interlocutors may competently be pronounced during vacation.

### Appeals

27. Appeal to Sheriff.—Subject to the provisions of this Act, an appeal to the sheriff shall be competent against all final judgments of the sheriff-substitute and also against interlocutors—

(a) Granting or refusing interdict, interim or final;

(b) Granting interim decree for payment of money other than a decree for expenses, or making an order *ad factum præstandum*;

(c) Sisting an action;

(d) Allowing or refusing or limiting the mode of proof not being an interlocutor fixing a diet for jury trial;

(e) Against which the sheriff-substitute either *ex proprio motu* or on the motion of any party grants leave to appeal;

Provided always that notwithstanding the death, resignation, or removal of a sheriff, appeals may be taken from the judgment of the sheriff-substitute, which appeals shall be heard by the succeeding sheriff when he shall enter upon office.

28. Appeal to Court of Session.—Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a sheriff-substitute or of a sheriff, but that only if the value of the cause exceeds fifty pounds; and the interlocutor appealed against is a final judgment; or is an interlocutor—

(a) Granting interim decree for payment of money other than a decree for expenses;

(b) Sisting the action;

(c) Against which the sheriff or the sheriff-substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal: Provided that any exclusion or allowance of appeal competent under any Act of Parliament in force for the time being shall not be affected by this or the preceding section.

29. Effect of Appeal.—An appeal shall be effectual to submit to review the whole of the interlocutors pronounced in the cause, and shall be available to and may be insisted in by all other parties in the cause notwithstanding they may not have noted separate appeals. An appeal shall not prevent immediate execution of a warrant of sequestration for rent, or of warrants to take inventories, or place effects in custody *ad interim*, or warrants for interim preservation, and an interim interdict, although appealed against, shall be binding till recalled.

### Removal of Cause to Court of Session for Jury Trial

30. Removal of Cause for Jury Trial.—In cases originating in the sheriff court (other than claims by employees against employers in respect

of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof (other than an order for proof to lie *in retentis* or for recovery of documents), it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends.

### Jury Trial in Sheriff Court

31. Jury Trial in Sheriff Court.—In any action raised in the sheriff court by an employee against his employer concluding for damages under the Employers' Liability Act, 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may so soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the sheriff shall appoint the action to be tried before a jury of seven persons. The verdict of the jury shall be applied in an interlocutor by the sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds:—

(1) That the verdict has been erroneously applied by the sheriff;
(2) That the verdict is contrary to the evidence;
(3) That the sheriff had in the course of the trial unduly refused or admitted evidence or misdirected the jury;
(4) That an award of damages is inadequate or is excessive.

Upon such appeal the court may refuse the appeal or may find under head (1) that the verdict was erroneously applied, and give judgment accordingly, or under the other heads before mentioned may set aside the verdict and order a new trial, provided that if the judges are equally divided in opinion the verdict shall stand.

32. Sheriff to State Questions for Jury.—Where jury trial has been ordered, the sheriff shall, after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proponed to the jury and fixing a time and place for the trial, being not sooner than fourteen days from the date of the interlocutor.

33. Remuneration of Jurors.—Where jury trial has been ordered, the party moving for it shall, on each day the trial proceeds, before the proceedings commence, deposit with the sheriff-clerk the sum of three pounds ten shillings, which deposit shall form part of the expenses of the cause; failing any such deposit being made, the sheriff may dismiss the cause. Out of said fund the sheriff-clerk shall pay to each juror a fee of ten shillings for each day on which he is empanelled. When a jury trial is not proceeded with, said deposit shall be returned to the depositor.

Removings

34. Removings.—Where lands exceeding two acres in extent are held under a probative lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right, against the lessee or any party in possession, and such lease or extract shall, along with authority in writing signed by the lesser or any one in his right or by his factor or law agent, be sufficient warrant to any sheriff-officer or messenger-at-arms of the sheriffdom within which such lands or heritages are situated, to eject such party in possession, his family, sub-tenants, cottars, and dependants, with their goods, gear, and effects, at the expiry of the term or terms of endurance of the lease: Provided that previous notice in writing to remove shall have been given—

(a) When the lease is for three years and upwards not less than one year and not more than two years before the termination of the lease; and

(b) In the case of leases from year to year (including lands occupied by tacit relocation) or for any other period less than three years, not less then six months before the termination of the lease (or where there is a separate ish as regards land and houses or otherwise before that ish which is first in date):

Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year: Provided further that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), or against whom a decree of cessio has been pronounced under the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal: Provided further that removal or ejectment in virtue of this section shall not be competent after six weeks from the date of the ish last in date: Provided further that nothing herein contained shall be construed to prevent proceedings under any lease in common form; and that the foregoing provisions as to notice shall not apply to any stipulations in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes or to subjects let for any period less than a year.

35. Letter of Removal.—Where any tenant in possession of any lands exceeding two acres in extent (whether with or without a written lease) shall, either at the date of entering upon the lease or at any other time, have granted a letter of removal, either holograph or attested by one witness, such letter of removal shall have the same force and effect as an extract decree of removing, and shall be a sufficient warrant for ejection to the like effect as is provided in regard to a lease or extract thereof, and shall be operative against the granter of such letter of removal or any party in his right within the same time and in the same manner after the like previous notice to remove: Provided always that where such letter is dated and signed within twelve months before the date of removal or before the first ish if there be more than one ish, it shall

not be necessary that any notice of any kind shall be given by either party to the other.

36. Notice to Remove.—Where lands exceeding two acres in extent are occupied by a tenant without any written lease, and the tenant has given to the proprietor or his agent no letter of removal, the lease shall terminate on written notice being given to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant, not less than six months before the determination of the tenancy, and such notice shall entitle the proprietor, in the event of the tenant failing to remove, to apply for and obtain a summary warrant of ejection against the tenant and every one deriving right from him.

37. Notice of Termination of Tenancy.—In all cases where houses, with or without land attached, not exceeding two acres in extent, lands not exceeding two acres in extent let without houses, mills, fishings, shootings, and all other heritable subjects (excepting land exceeding two acres in extent) are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor or to the proprietor by or on behalf of the tenant: Provided always that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the sheriff for a warrant for summary ejection in common form against the tenant and every one deriving right from him: Provided further that the notice provided for by this section shall be given at least forty days before the fifteenth day of May when the termination of the tenancy is the term of Whitsunday, and at least forty days before the eleventh day of November when the termination of the tenancy is the term of Martinmas.

### Summary Removings

38. Summary Removing.—Where houses or other heritable subjects are let for a shorter period than a year, any person by law authorised may present to the sheriff a summary application for removing, and a decree pronounced in such summary cause shall have the full force and effect of a decree of removing and warrant of ejection. Where such a let is for a period not exceeding four months, notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the ish as shall be equivalent to at least one-third of the full period of the duration of the let; and where the let exceeds four months, notice of removal shall, in the absence of express stipulation, be given at least forty days before the expiry of the said period.

### Procedure Rules

39. Procedure Rules.—Subject to the provisions of any Act of Parliament in force after the passing of this Act, the procedure in all civil causes shall be conform to the rules of procedure set forth in the First Schedule hereto annexed. Such rules shall be construed and have effect as part of this Act.

40. Court of Session to Regulate Fees, etc.—The Court of Session may from time to time, by Act of Sederunt, make such regulations not inconsistent with the provisions of this Act as may be necessary for carrying into effect the purposes thereof for regulating the practice of the sheriff

courts (including diligence and procedure under the Small Debt Acts); and for regulating the fees of agents, officers, shorthand writers, and others, and, with the concurrence of the Treasury, for regulating the fees of court; and for altering, amending, or adding to the rules of procedure in the First Schedule hereto: Provided that at least two weeks before the same is signed the terms of the proposed Act of Sederunt shall be published in the *Edinburgh Gazette* and at least two other newspapers in Scotland: Provided also that every such Act of Sederunt shall, within one week from the date thereof, be transmitted by the Lord President of the Court of Session to the Secretary for Scotland, in order that it may be laid before the Houses of Parliament; and if either of the Houses of Parliament shall within thirty-six days after it has been laid before them resolve that the whole or any part of such Act of Sederunt ought not to continue in force, the whole or such part thereof as shall be included in such resolution shall from and after the date of the passing of such resolution cease to be binding.

41. Meetings of Sheriffs.—For the purpose of preserving uniformity in the proceedings of sheriff courts, the sheriffs shall meet in Edinburgh once at least in each year, and may then, or at any other meeting, formulate for the consideration of the Court of Session any regulations which they propose should be enacted by Act of Sederunt, a printed draft of the same having been exhibited in each sheriff court for the space of fourteen days before the same is submitted to the court: Provided also that the necessary expenses of such meetings of sheriffs and of preparing and printing such propositions shall be allowed in the annual accounts in Exchequer of such one of the sheriffs as may from time to time be appointed by them to be their convener in the like manner as other ordinary expenses of sheriffs are allowed. In this section "sheriff" does not include "sheriff-substitute."

## Small Debt Acts

42. Extension of Small Debt Jurisdiction to £20.—The provisions of the Small Debt Acts shall extend and apply to all causes competent thereunder where the value of the cause does not exceed twenty pounds, and wherever the words "eight pounds six shillings and eightpence" or the words "twelve pounds" occur in these Acts they shall be read and construed as if for these words there were substituted the words "twenty pounds."

43. Small Debt Sequestration for Rent.—The provisions of the Small Debt Acts for sequestration for rent shall extend to all sequestrations applied for *currente termino* or in security.

44. Parties may Appear by Agents in Small Debt Court.—Section eight of the Small Debt Amendment (Scotland) Act, 1889 (52 & 53 Vict. c. 26), is hereby repealed, and in lieu thereof it is enacted that in any cause brought under the Small Debt Acts any party may appear by or along with an agent, and the sheriff may allow and include in the expenses of the cause a fee to such agent.

45. Procedure Rules Applicable to Small Debt Causes.—The provisions of section three (except subsections (*d*), (*h*), (*i*), (*k*), (*l*), (*m*), and (*p*)), section four, subsection (2) of section five, so far as relating to claims for aliment, section six (except subsection (*e*)), section forty-nine and section fifty-one hereof, and the rules ten, eleven, twelve, thirteen, fourteen, fifteen, seventeen, nineteen, twenty-one, twenty-six, fifty, fifty-five, sixty, sixty-three, seventy, seventy-nine, eighty, one hundred and twenty-six, one

hundred and twenty-seven, one hundred and twenty-eight, one hundred and twenty-nine, one hundred and fifty one, in the First Schedule hereto shall, so far as appropriate, apply to causes under the Small Debt Acts.

46. Sections 10 and 11 of the Debtors (Scotland) Act, 1838, [1] to Apply to Small Debt Causes.—The provisions of sections ten and eleven of the Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), shall not apply to decrees of delivery under the Small Debt Amendment (Scotland) Act, 1889, but such decrees shall be enforceable by imprisonment under the warrant for execution contained in Schedule B of the Small Debt Amendment (Scotland) Act, 1889.

47. Second Extract of Small Debt Decree Competent.—It shall be lawful to issue a second or further extract of any decree under the Small Debt Acts, in the form as nearly as may be of Schedule B or C of the Small Debt Amendment (Scotland) Act, 1889, which extract may be written upon a separate paper, and shall have the same force and effect in all respects as the first extract.

48. Small Debt Cause may be Remitted to Ordinary Court Roll.—If the sheriff is of opinion that the importance of the questions raised in any cause brought under the Small Debt Acts warrants that course, he may at any stage remit the cause to his ordinary court roll either on cause shown or *ex proprio motu*, in which case the cause shall proceed in all respects (including appeal) as if it had been originally raised in the ordinary court.

### Postal Charge

49. Postal Charge.—Where a charge is necessary upon a decree for payment of money granted in the small debt court, and the place of execution of the charge is more than twelve miles distant from the seat of the court where such decree was granted, a charge may be given by post in the manner prescribed by the Citation Amendment (Scotland) Act, 1882 (45 & 46 Vict. c. 77).

### Summary Applications

50. Summary Applications.—In summary applications (where a hearing is necessary) the sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing: Provided that wherever in any Act of Parliament an application is directed to be heard, tried, and determined summarily or in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), such direction shall be read and construed as if it referred to this section of this Act: Provided also that nothing contained in this Act shall affect any right of appeal provided by any Act of Parliament under which a summary application is brought.

### The Poor's Roll

51. Poor's Roll.—Where parties are unable from poverty to pursue or defend an action, it shall be lawful for the sheriff to admit such parties to the benefit of the poor's roll if, upon the report of the procurators for the poor, he is satisfied that such person is entitled thereto.

[1] The word "not" appears to have been omitted from the rubric in the statute.

### Repeal

52. Repeal of Statutes.—The enactments mentioned in the Second Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of that Schedule, and all laws, statutes, Acts of Sederunt, orders and usages now in force so far as the same are inconsistent with the provisions of this Act, are also hereby repealed: But provided that all actions pending at the date of the commencement of this Act shall nevertheless proceed to final determination in all respects as if this Act had not been passed.

## SCHEDULES

### FIRST SCHEDULE (ss. 39, 40, and 45)

#### Rules for Regulating Procedure in the Ordinary Court

#### Forms of Process

1. Initial Writ.—Subject to the provisions of the Titles of Land Consolidation (Scotland) Act, 1868, and the Conveyancing and Land Transfer (Scotland) Act, 1874, as regards service of heirs and completion of title, all action shall be commenced by writ as nearly as may be in the Form A hereto annexed.

2. Copy Account to be Served.—Where the claim or demand is founded upon a stated account, a copy of the account shall be endorsed upon or attached to the initial writ and served along with it.

3. Writ to be Signed.—The writ shall be signed by the pursuer or complainer or by his agent, and the name and address of pursuer's agent (if any) shall be upon the back of every service copy.

4. Form of First Warrant.—The warrant of citation shall be as nearly as may be—

(*a*) In summary causes and summary removings, and also in summary applications when citation is necessary and in cases under the Workmen's Compensation Act, in the Form B hereto annexed:

(*b*) In all other causes, in the Form C hereto annexed.

#### Induciæ

5. Induciæ of Citation.—Actions shall proceed upon seven days' warning or induciæ when the defender is within Scotland, or fourteen days when he is in Orkney or Shetland or in any other island within Scotland or is furth of Scotland.

6. Special Induciæ.—The sheriff may shorten or may extend the induciæ, but not so as to be in any case less than forty-eight hours.

#### Citation

7. Signature of Warrants.—Warrants may be signed by the sheriff-clerk, but any warrant may be signed by the sheriff or sheriff-substitute, and must be so signed if it contains an order for shortening or extending

the inducie or for interim interdict, sequestration, or other order not being an order for citation or warrant to arrest. In actions against persons furth of Scotland the warrant may authorise service edictally.

8. Mode of Citation.—Citation may be in the Form D hereto annexed, and the form of execution of citation, which shall be appended to or endorsed upon the initial writ, may be in the Form E hereto annexed.

9. Attestation of Officer's Execution of Citation.—If a warrant is executed by an officer, one witness shall be sufficient for the execution of citation, and the execution shall be signed by the officer and the witness, and shall specify whether the citation was personal, or, if otherwise, the mode of citation.

10. Endorsation of Warrant by Sheriff-Clerk of Defender's Residence not Necessary.—Any warrant of citation or any warrant or precept of arrestment proceeding upon a depending action or liquid document of debt may in any competent manner be lawfully executed within the jurisdiction of any sheriff without endorsation by the sheriff-clerk of that jurisdiction, and, if executed by an officer, may be so executed by an officer of the court which granted the warrant or precept, or by an officer of the jurisdiction within which it is to be executed.

11. Citing of Corporation.—A corporation or association, or a firm nominate or descriptive, or a board corporate or unincorporate, may be sued and summary diligence upon a sheriff court decree, or a decree of registration executed against them under their nominate or descriptive name alone, and may be competently cited at their principal place of business (which term shall include the office or place of business of the clerk or secretary of any board or corporation), or where the principal place of business is outwith the jurisdiction, at any place of business within the jurisdiction.

12. Service of New.—If it appear to the sheriff that there has been any irregularity in service upon a defender who has not appeared, the sheriff may authorise the pursuer or complainer to make service of new upon such conditions as to the sheriff shall seem just.

13. Defender Appearing Barred Objecting to Citation.—A party who appears may not state any objection to the regularity of the service upon himself, and his appearance shall be deemed to remedy any defect in the service, unless where jurisdiction has been constituted by citation or by arrestment *ad fundandam jurisdictionem.*

14. Citation of a Minor.—Service in ordinary form on a minor and on his father as curator-at-law, or, upon a minor and his tutors and curators if known to pursuer, or, if they are not known, upon the minor himself in ordinary form, and his tutors and curators edictally, shall be good and sufficient service on the minor for every purpose of law.

15. Edictal Citation.—It shall be competent to execute edictally any warrant of citation granted or charge on an extracted decree pronounced by a sheriff against any person furth of Scotland, by delivery of a copy thereof at the office of the keeper of edictal citations at Edinburgh, according to the mode established in regard to the execution edictally of citations and charges on warrants of the Court of Session; or by sending to such keeper in a registered post-letter a certified copy of such warrant or charge, of which copy the keeper shall acknowledge receipt. Every citation or charge so executed edictally shall be recorded in the record of edictal citations in Edinburgh in a separate record of edictal citations or charges against

persons furth of Scotland cited or charged upon warrants proceeding from any sheriff court. Where the party cited or charged has a known residence or place of business in England or Ireland, a copy of the writ and citation or of the decree and charge on fourteen days' induciæ shall be posted in a registered letter to the party at such address, and the execution shall express that this has been done. The sheriff-clerk shall in all warrants to cite persons furth of Scotland insert a warrant to cite edictally, and along with the execution of edictal citation pursuer's agent shall lodge a certificate of such postal intimation and the post office registered letter receipt.

### Custody of Process

16. Custody of Process.—Every initial writ shall after tabling remain in the custody of the sheriff-clerk, unless the sheriff shall grant a special order to the contrary. A process may be borrowed only by an agent entitled to practise in the jurisdiction, or by his duly authorised clerk, for whom he shall be responsible.

17. Lost Documents may be Replaced by Copies.—When any number of process is lost or destroyed, a copy thereof, authenticated in such manner as the sheriff may require, may be substituted, and shall for the purposes of the action be equivalent to the original.

18. Interlocutor Sheets, etc., to be Lodged by Pursuer.—In a defended action the pursuer shall lodge with the sheriff-clerk principal and duplicate interlocutor sheets and a principal and borrowing inventory of process; and the sheriff-clerk shall endorse upon all pleadings the date when the same are lodged. The principal interlocutor sheets and the borrowing inventory shall remain in the custody of the sheriff-clerk.

### Transfer of Causes

19. Transfer of Cause to more Convenient Sheriffdom where Several Defenders in Different Sheriffdoms.—Where an action in which there are two or more defenders has been brought in the court of the domicile of one of them, the sheriff may transfer the cause to any other court which has jurisdiction over any of the defenders, if in his opinion it is expedient that this should be done, and an action so transferred shall proceed in all respects as if it had been originally brought in that court.

20. Sheriff on Cause shown may Remit to another Sheriffdom.—The sheriff may upon sufficient cause, by interlocutor stating his reasons, remit any cause to another sheriffdom, and such interlocutor, when issued by a sheriff-substitute, shall by leave of the sheriff-substitute, and within seven days only, be subject to review by the sheriff, but shall not be further subject to review.

21. Where Plea of No Jurisdiction Stated, Cause may be Remitted to proper Sheriffdom.—Where a plea of no jurisdiction is sustained, the sheriff may, if he think proper, and upon such conditions as to costs as he may think fit, remit the cause to the sheriff before whom it appears to him it ought to have been brought, and it shall thereafter proceed in all respects as if it had been originally there brought. When such remit is made by the sheriff-substitute, the interlocutor remitting shall by leave of the sheriff-substitute and within seven days only be subject to review by the sheriff, but shall not be further subject to review.

### Appearance

22. Notice of Appearance.—If a defender intend to state a defence, he shall (except in a summary cause), before the expiry of the induciæ, lodge with the sheriff-clerk a notice of appearance in the following terms:—

[Place and date]—C. D., [design him] defender, intends to defend the action against him [and others] at the instance of A. B. [design him].

C. D. *Defender*,
or X. Y. [add address],
*Defender's Agent.*

### Undefended Causes

23. In Undefended Cause Decree may be Granted at any time after Expiry of Induciæ.—Where a defender does not answer or lodge a notice of appearance, the sheriff may at any time, after the expiry of the induciæ, upon written craving to that effect being endorsed upon the initial writ by the pursuer or his agent, decern in terms of the claim or demand as set forth in the initial writ, and for expenses as the same may be certified by a note endorsed upon the initial writ by the auditor of court, subject to any restriction endorsed upon the writ or set forth in a minute by the pursuer or his agent.

24. Extract of Decree in Absence in Seven Days.—The sheriff-clerk may issue an extract of such decree after the expiry of seven days from the date of the sheriff's judgment.

25. Finality of Decree in Absence.—A decree pronounced in absence, and which has not been recalled or brought under review by suspension, where suspension is competent, or by reduction, shall become final, and be entitled to all the privileges of a decree *in foro*—

(*a*) In six months from its date, or from the date of charge under it, where the service of the writ or of the charge has been personal:

(*b*) In any event after the lapse of twenty years from its date.

26. Amendment of Writ in Undefended Action.—In an undefended action the sheriff may allow the pursuer or his agent to amend any error or defect in the initial writ, and may, if he see fit, order the amended writs to be served upon the defender, and may allow him to appear within such time as he may think proper. But the expense occasioned by such amendment shall not be chargeable against the defender, and such amendment shall not have the effect of validating diligence used on the dependence of the action so as to prejudice creditors of the defender, but such amendment shall be operative to the effect of obviating objections to such diligence when stated by the defender himself, or by any persons representing him by a title, or in right of a debt contracted by him subsequent to the using of such diligence, and any diligence which was competent upon the original writ shall be competent upon the amended writ.

### Reponing

27. Defender may be Reponed against Decree in Absence.—At any time before implement of a decree in absence, the defender may apply to be reponed by lodging with the sheriff-clerk and serving upon pursuer

a note setting forth his proposed defence, and his explanation of his failure to appear.

28. Upon Consignation.—Along with this reponing note the defender shall consign the sum of two pounds in the hands of the sheriff-clerk.

29. Sheriff may Recall the Decree in Absence.—Upon such consignation, the sheriff, if satisfied with the defender's explanation, may recall the decree so far as not implemented, whereupon the action shall proceed in all respects as if the defender had appeared.

30. Or Refuse to Recall.—If the sheriff is not satisfied with the defender's explanation he may refuse the reponing note.

31. Pursuer Entitled to Consigned Money.—In either case the pursuer shall be entitled to uplift the consigned money.

32. Reponing Note to operate as Sist of Diligence.—A reponing note, when duly lodged and intimated to the pursuer or to his agent, shall operate as a sist of diligence.

33. Judgment upon a Reponing Note Final.—Any interlocutor or order upon a reponing note, or recalling, or incidental to the recall of a decree in absence, shall be final and not subject to review.

### Defended Causes

34. Defended Cause to be Tabled.—Where appearance has been entered, the sheriff-clerk, shall enrol the cause for tabling on the first court day occurring after the expiry of the induciæ.

35. If not Tabled to Drop from Roll.—An action which has not been tabled, and in which protestation has not been craved, shall drop from the roll, but within three months the sheriff may direct it to be again enrolled for tabling under such conditions as to notice, or re-service, or expenses, or otherwise as he shall think fit.

36. If Case not Tabled Defender may Crave Protestation.—If the pursuer do not then table the cause, the defender or his agent, upon producing the service copy of the writ, may crave protestation for not insisting, which the sheriff may grant, and may modify the amount of protestation money payable by defender.

37. Extract of Protestation.—Protestation shall not be extracted till the expiry of seven free days from the date of its granting, except where arrestments have been used, in which case extract may be given out after the lapse of forty-eight hours.

38. Effect of Protestation.—Upon protestation being extracted, the instance shall fall.

39. Recall of Protestation.—Before extract protestation may be recalled, and the pursuer may be allowed to proceed with his action upon making payment to the defender of the amount of the protestation money, and upon such other conditions as to the sheriff shall seem just.

40. Sheriff may Direct any Cause to be Tried as a Summary Cause.—When any defended action (other than a claim under the Workmen's Compensation Act) has been tabled, the sheriff of consent of parties, notwithstanding that its value exceeds fifty pounds, may, at any stage, direct that it be tried as a summary cause, and his decision as to this shall be final.

41. Procedure in a Summary Cause.—In a summary cause the sheriff may order a condescendence and defences if he thinks fit, or may make or certify a note upon the writ or separately of the pleas of parties and

appoint a diet for the trial of the cause, or may order such other procedure as the circumstances seem to him to require.

42. In Non-Summary Cause Condescendence within Three Days of Tabling.—In all other defended causes the pursurer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence setting forth succinctly and in articulate articles the grounds of action and his pleas-in-law.

43. Defences within Six Days.—Within six days of the condescendence being lodged the defender shall lodge his defences.

44. Enrolment for Adjustment.—The sheriff-clerk shall, upon defences being lodged, enrol the cause for an ordinary court day occurring not less than four days thereafter for adjustment. The adjustment shall not be adjourned more than once unless upon special cause shown.

45. Certified Copy Writ Warrant for Arrestment.—In every defended action the pursuer shall, after defences have been lodged, and before the diet for adjustment, lodge in process a copy of the initial writ and warrant thereon certified by him or his agent, which may thereafter be borrowed by the agent of any party to the process, and such certified copy shall be sufficient warrant where competent to arrest on the dependence. Separate precepts of arrestment may be issued by the sheriff-clerk upon production to him of a writ containing pecuniary conclusions upon which a warrant of citation has been granted, or of a liquid document of debt.

46. Form of Defences.—Defences shall be in the form of articulate answers to the condescendence, having appended a note of defender's pleas, and where necessary a statement of facts founded on in defence which shall be set forth succinctly.

47. Documents Founded on to be Produced before Record Close.—Each party shall, along with his pleadings, or at latest before the closing of the record, if required by any other party in the action or by the sheriff, lodge any documents founded upon in the pleadings, so far as the same are within his custody or power.

48. Diligence for Recovery of such Documents.—Where such documents are not produced by either party, or where they are in the hands of third parties, the sheriff may, on the motion of either party, grant commission and diligence for their recovery, and may on that account delay closing the record.

49. Revisal may be Ordered.—The sheriff may upon cause shown, or *ex proprio motu*, order a revisal of the pleadings, or may order pursuer to answer defender's separate statement of facts.

50. Documents may be Challenged *Ope exceptione*.—When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.

51. Caution may be Ordered when Action of Reduction Competent.—The sheriff may, where an objection is so stated and where an action of reduction would be competent, order the objector to find caution or to make consignation as he shall direct.

52. Closing Record.—When the pleadings have been adjusted the sheriff shall close the record.

53. Alterations to be Initialed by Sheriff.—All alterations or additions made on the record shall be authenticated by the sheriff's initials.

54. Preliminary Pleas to be First Disposed of.—If preliminary pleas have been stated the sheriff shall first dispose of them, unless he

thinks that from their being connected with the merits, or on any other ground, they should be reserved till a future stage of the cause.

55. Counter-Claim may be Stated in Defences.—Where a defender pleads a counter-claim it shall suffice that he state the same in his defences, and the sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on.

56. Failure of either Party to Appear or to Implement Orders of Court Entitles other Party to Decree.—In a defended action (including a jury case), when any production or pleading has not been lodged or order implemented within the time required by statute or ordered by the sheriff, or where in a defended action either party fails to appear by himself or his agent at any diet, or fails to make payment of any court dues or deposit, the sheriff may grant decree as craved, or of absolvitor, or may dismiss the action, with expenses, but the sheriff may upon cause shown prorogate the time for lodging any production or pleading or implementing any order. If all parties fail to appear, the sheriff shall, unless sufficient reason appear to the contrary, dismiss the action.

57. Agent Failing to Return Process may be Fined.—When an agent has borrowed a process, or any part thereof, and fails to return it for any diet at which it is required, the sheriff may impose upon such agent a fine not exceeding one pound, which shall be payable to the clerk of court for behoof of His Majesty's Exchequer, but an order so imposing a fine may, on cause shown, be recalled by the sheriff who granted it. Orders made under this section shall not be subject to review. For the purposes of this section every agent practising before his court shall be subject to the jurisdiction of the sheriff.

58. If Probation Renounced, Parties to Sign Minute.—If at the time of closing the record the parties renounce probation, they shall sign a minute to that effect on the interlocutor sheet, and the sheriff may order the case to be debated then or at a subsequent diet.

59. Proof may be Ordered. — If proof is necessary, the sheriff shall (unless the cause has been ordered for jury trial), with the least possible delay, fix a date for taking the proof, and may limit the mode of proof.

60. Remit to Person of Skill.—The sheriff may remit to any person of skill, or other person, to report on any matter of fact; and when such remit is made of consent of both parties, the report of such person shall be final and conclusive with respect to the matter of the remit. When such a remit is made, upon the motion of either party, the expense attending its execution shall in the first instance be paid by the party moving for it. When the remit is on joint motion, or by the sheriff *ex proprio motu*, the expense shall in the first instance be paid by the parties equally, unless the sheriff shall otherwise order.

61. Parties may by Minute Agree to Cause being Tried as Small Debt Cause.—The parties to any action may lodge in process a minute, signed by themselves or their agents, agreeing to the cause being disposed of in the manner provided under the Small Debt Acts, whereupon the sheriff shall remit the action to his Small Debt Court roll, and the whole powers and provisions of the Small Debt Acts shall become applicable to the cause.

62. Diligence for Recovery of Documents.—At any time after a proof has been allowed, or an order made for jury trial, the sheriff, upon the

motion of either party, may grant commission and diligence for the recovery of such documents as the sheriff shall deem relevant to the cause.

63. Evidence to Lie in Retentis.—Evidence in danger of being lost may be taken to lie *in retentis*, and, if satisfied that it is desirable so to do, the sheriff may, upon the motion of either party at any time, either take himself, or grant authority to a commissioner to take, such evidence.

64. Reference to Oath.—When any person desires to refer to the oath of his adversary, he shall lodge a minute to that effect, signed by himself or his agent. If the party to whose oath reference has been made fail to appear at the diet for taking his deposition, the sheriff may hold him as confessed, and decern accordingly.

65. Recording of Evidence.—Evidence in a cause or a deposition, whether before the sheriff or a commissioner, may be taken down by the sheriff or commissioner, or by a clerk or shorthand writer nominated by the sheriff or commissioner, to whom the oath *de fideli administratione* shall be administered and evidence may be recorded in narrative form or by question and answer as the sheriff or commissioner shall direct, and the extended notes of evidence, certified by such clerk or shorthand writer, shall be the notes of the oral evidence in the cause. The sheriff or commissioner may, if he think fit, dictate to the clerk or shorthand writer what he is to record.

66. Sheriff may Amend Record of Evidence.—If the correctness of the notes of evidence or of a deposition be questioned, the sheriff may satisfy himself in regard thereto by the examination of witnesses or otherwise, and may amend the record of evidence or a deposition.

67. Shorthand Writer's Fees.—When a shorthand writer is so employed to record evidence, he shall in the first instance be paid, as regards commissions by the party moving for the commission, and as regards proofs or jury trials by the parties equally. The agents of parties shall be personally liable for the shorthand writer's fees. And it shall be competent for the sheriff to make an order directing payment to be made.

68. Production of Documents may be Ordered.—The sheriff may order production of documents at any stage of the cause, and the sheriff may allow a party, at any time before judgment, to produce any document which he has failed to produce timeously, upon such conditions as to payment of expenses and allowing further proof as to the sheriff shall seem just.

69. Proof to be Taken Continuously.—The proof shall be taken so far as possible continuously, but the sheriff may adjourn the diet from time to time.

70. Evidence may be Taken on Commission.—The evidence of any witness or haver resident beyond the jurisdiction of the court, or who although resident within the jurisdiction resides at some place remote from the seat of the court, or who is by reason of illness, age, or infirmity unable to attend the diet of proof, or a jury trial, may be taken by commission in like manner as evidence to lie *in retentis*.

71. Citation of Witnesses.—A copy of an interlocutor certified by the sheriff-clerk allowing a proof or fixing a diet for the trial of any action or for the examination of witnesses or havers, or fixing a date for a jury trial, shall be sufficient warrant for citation of witnesses or havers. If any witness or haver duly cited on an *inducice* of at least forty-eight hours, and after having been tendered his travelling expenses, if the same shall have been demanded, fail to attend a diet, either before the sheriff or before his commissioner, such witness or haver may be ordained by the sheriff to forfeit and pay a penalty

not exceeding forty shillings, unless a reasonable excuse be offered and sustained, and the sheriff may grant decree for said penalty in favour of the party on whose behalf said witness or haver was cited.

72. Form of Citation.—Witnesses and havers may be cited as nearly as may be in Form F hereto annexed, and the execution of citation shall be as nearly as may be in the Form G, and an agent who cites a witness shall be personally liable for the fees of the witness.

73. Second Diligence against Witness Failing to Attend.—It shall further be competent to the sheriff to grant second diligence (which shall be effectual in any sheriffdom within Scotland without endorsation) for compelling the attendance of said witness or haver under pain of arrest and imprisonment, until caution be found as the sheriff may require for his due attendances, the expense whereof may in like manner be decerned for against the witness or haver.

74. Objections Taken in course of Proof to be Noted.—When the sheriff, or a commissioner, repels or sustains an objection taken in the course of a proof, the objection stated, and any answer made to it, shall, if desired by the objector, be shortly noted on the notes of evidence to the sheriff's or commissioner's dictation, but the examination of the witness shall nevertheless proceed. The sheriff or commissioner may, if he consider the objections of sufficient importance, direct the evidence objected to to be taken on a separate paper; but it shall not be competent during the course of a proof to submit to review any judgment pronounced upon the competency of the evidence.

75. Appeal on Questions of Admissibility of Evidence.—On the proof being declared closed, or within seven days thereafter, if the sheriff-substitute has not in the interval pronounced judgment, it shall be competent by leave of the sheriff-substitute to appeal to the sheriff upon objections to the admissibility of evidence taken during the course of the proof, and the sheriff shall, with or without a hearing, dispose of such appeal with the least possible delay, and if he think that evidence accepted should not have been allowed, he may delete the same from the notes of evidence, and if he think that evidence has been improperly rejected, he may appoint the same to be taken before the case is advised on its merits.

76. Appeal on ground of Confidentiality.—If any person, whether a party to the cause or other person, plead before the sheriff-substitute confidentiality with reference to documentary or oral evidence, or, on pleas of alleged hypothec or otherwise, shall object to produce documents, the sheriff-substitute shall, on the notes of evidence, minute his decision on such pleas, and any party in the cause or the party pleading confidentially[1] by leave of the sheriff-substitute may, in open court, take an appeal to the sheriff, who shall, with or without a hearing and with the least possible delay, dispose of such appeal.

77. Proof to Proceed notwithstanding such Appeal.—Such incidental appeal shall not remove the cause from the sheriff-substitute, who may proceed with the cause as regards points not necessarily dependent upon the ruling so appealed against.

78. Parties to be Heard at Close of Proof.—At the close of the proof, or at an adjourned diet, if for any reason the sheriff shall see fit to postpone the hearing, the sheriff shall hear the parties or their agents, and thereafter shall pronounce judgment with the least possible delay.

[1] Misprint in the Act for "confidentiality."

### Amendment of Pleadings

79. Record may be Amended by Sheriff.—Upon the motion of either party the sheriff may, at any stage of the cause, and upon such conditions as to expenses, re-service or otherwise as he shall deem proper, allow a record to be altered or amended to the effect of determining the real question in controversy (including amendment of the instance and the initial writ and the adding of parties) notwithstanding that the conclusions of the action may thereby be enlarged or altered.

80. Effect of Amendment.—No such amendment shall have the effect of validating diligence used prior thereto on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but such amendment shall be operative to the effect of obviating objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the execution of such diligence.

### Abandonment

81. Abandonment of Action.—A pursuer may, at any stage of an action before an interlocutor granting absolvitor or dismissing the action has been pronounced, offer to abandon his action by lodging a minute to that effect, signed by himself or his agent, in which case, upon payment to defender of his expenses, the sheriff may dismiss the action, and pursuer may bring a new action if otherwise competent. If the pursuer fails, within fourteen days of the date of taxation, to pay the defender's expenses, the defender shall be entitled to decree of absolvitor, with expenses.

### Judgment

82. Sheriff to State Reasons for Judgment.—To all interlocutors, except those of a formal nature, the sheriff shall append a note setting forth the grounds upon which he has proceeded, and in his final judgment on the merits he shall set forth his findings in fact and in law separately.

83. Date of Judgment to be Date of Entry in Court Books.—The sheriff may pronounce or sign any judgment or interlocutor when furth of his sheriffdom, but the date of every interlocutor shall be deemed to be the date upon which it is entered in the books of the court.

84. Clerical Error in Judgment may be Corrected.—At any time before extract, or before the transmission of a process in which an appeal has been taken, the sheriff may correct any clerical or incidental error in his judgment.

### Extract

85. Time of Extract.—Extract of any decree, interlocutor, or order of the sheriff (other than a decree in absence or a decree for expenses), if the same shall not have been sooner appealed against, may be issued in a summary cause after the lapse of seven days; and in any other cause, after the lapse of fourteen days from its date, or at such earlier date as the sheriff shall allow extract.

### Appeal

86. Appeal from the Sheriff-Substitute.—A final judgment of the sheriff-substitute may, if appeal be competent and unless otherwise provided, be appealed to the sheriff or to the Court of Session at any time within three months of its date (but not later), if the same shall not sooner have been extracted or implemented. Any other appealable interlocutor of the sheriff-substitute may be appealed within fourteen days (but not later), if not sooner extracted.

87. Form of Appeal.—An appeal shall be taken by the appellant or his agent dating and signing a note on the interlocutor sheet in the following terms:—

The pursuer [or defender or other party] appeals [to the sheriff] or [to the Division of the Court of Session].

Or if the interlocutor sheet is not in the hands of the sheriff-clerk (which fact shall be certified by him), the note of appeal may be written upon a separate paper, and lodged along with the sheriff-clerk's said certificate.

88. On Appeal, Process to go to Sheriff or Clerk of Session.—On an appeal being taken, the sheriff-clerk shall within two days transmit the process to the sheriff or to the principal clerk of session as the case may be, and also send written notice of the appeal to the other parties or their agents, but failure to give such notice shall not invalidate the appeal.

89. Reclaiming Note or Oral Hearing may be Ordered.—The sheriff may order a reclaiming note and answers, or may hear parties orally.

90. But may be Dispensed with.—The sheriff may, on the motion of both parties and if he see fit, dispose of the appeal without ordering either a reclaiming note and answers or an oral hearing.

91. Sheriff to Regulate Interim Possession, etc., Pending Appeal.—Notwithstanding an appeal, the sheriff shall have power to regulate all matters relating to interim possession, to make any order for the preservation of any property to which the action relates or for its sale if perishable, or for the preservation of evidence, or to make in his discretion any interim order which a due regard to the interests of the parties may require. Such orders shall not be subject to review except by the Appellate Court at the hearing of the appeal.

92. Appeal to Court of Session.—Within three months from its date (but not later) a final judgment of the sheriff, if not sooner extracted or implemented, may, if appeal be competent, be appealed to the Court of Session. Any other appealable judgment of the sheriff may, if not sooner extracted or implemented, be appealed within fourteen days (but not later).

93. Form of Appeal.—The party desiring so to appeal, or his agent, shall do so by writing on the interlocutor sheet (or on a separate paper, in like manner as in the case of an appeal from the sheriff-substitute) a note in the following terms:—

The pursuer [*or* defender *or* other party] appeals to the Division of the Court of Session.

94. Sheriff-Clerk to Transmit Process to Edinburgh.—On receiving such note of appeal, the sheriff-clerk shall within two days transmit the process to the principal clerk of session at Edinburgh, and shall also send written notice of the appeal to the other parties or their agents, but failure to give such notice shall not invalidate the appeal.

95. Form of Appeal to Court of Session in Actions Advocated under this Act.—If any action is desired to be removed to the Court of Session in terms of sections five and thirty of this Act, the party so desiring its removal shall write a minute to that effect upon the interlocutor sheet, whereupon the sheriff-clerk shall give intimation to the other parties or their agents and shall transmit the process to the keeper of the roll of the Court of Session, who shall, under the direction of the Lord President, allocate the cause to a Division and a Lord Ordinary, and thereafter the cause shall proceed in all respects as if it had originally been raised in the Court of Session.

96. Abandonment of Appeal.—After an appeal has been noted, the appellant shall not be entitled to abandon it unless of consent of all parties, or by leave of the Appellate Court.

97. In section 86, 87, 88, 89, 90, and 92 "sheriff" does not include sheriff-substitute.

### Expenses

98. Decree for Expenses to Include Dues of Extract.—Every decree for expenses shall be deemed to include a decree for the expense of extracting the same, and extract of such decree for expenses may be issued after the lapse of seven days unless otherwise directed by the sheriff.

99. Decree for Expenses may be Extracted in Agent's Name.—Expenses allowed in any action, whether in absence or *in foro*, shall, unless modified at a fixed amount, be taxed before decree is granted for them, and the sheriff may allow a decree for expenses to go out and be extracted in name of the agent who conducted the cause.

100. Objection to Auditor's Report.—Within two days after the lodging of the auditor's report on taxation, it shall be competent to lodge a note of objections to an auditor's report, and the sheriff shall dispose of such objections in a summary manner, with or without answers.

### Wakening

101. Wakening Action.—If no interlocutor shall have been pronounced in a cause for a year and a day, it shall be held to have fallen asleep.

102. To be by Minute.—Where the whole of the parties or their agents subscribe a minute on the interlocutor sheet consenting to the cause being wakened, the sheriff may pronounce an interlocutor wakening the cause, and thereafter proceed with it.

103. Publication of Application for Wakening.—Where all parties do not so consent, the party desiring to have the cause wakened may lodge a minute to that effect, which the sheriff may order to be intimated to the other parties or their agents, and to be published in such manner as the sheriff shall direct, and the agent for the party applying for wakening shall lodge a certificate that the intimation and publication ordered have been made. If satisfied, the sheriff may thereafter pronounce an interlocutor wakening the cause, and proceed with it.

### Sequestration for Rent

104. In Sequestration for Rent.—In actions for sequestration and sale, for recovery, or in security of rent, whether brought after the term

of payment or *currente termino*, payment of rent may be concluded for, and decree for payment of such rent or part thereof, when the same has become due and payable, may be pronounced and be extracted in common form.

105. Warrant may be Granted to Inventory and Secure.—In the first deliverance upon a writ for sequestration for rent the sheriff may sequestrate the effects of a tenant, and grant warrant to inventory and secure the same and all warrants to sequestrate, inventory, sell, eject, or relet shall be deemed to include authority, if need be, to open shut and lockfast places for the purpose of carrying such warrants into execution.

106. Sequestrated Effects may be Sold.—The sheriff may order the sequestrated effects to be sold at the sight of an officer of court or other person named.

107. Sale to be Reported within Fourteen Days.—When a sale follows, it shall be reported within fourteen days, and pursuer shall lodge the roup rolls or certified copies thereof and a state of debt.

108. Sheriff may Decree for Balance Due after Sale.—In the interlocutor approving the report of sale, or by separate interlocutor, the sheriff may give decree against the defender for any balance remaining due.

109. Sheriff may Appoint Caretaker or Order Caution.—The sheriff may at any stage appoint a fit person to take charge of the sequestrated effects, or may require the tenant to find caution that they shall be made forthcoming.

### Removings

110. Action of Removing where Fixed Term of Removal.—An action of removing may be raised at any time, provided the tenant has bound himself to remove by writing, dated and signed within twelve months of the term of removal, or, where there is more than one ish, of the ish first in date to remove. When the tenant has not so bound himself, an action of removing may be raised at any time, provided that—

(*a*) In the case of a lease of lands exceeding two acres in extent for three years and upwards, an interval of not less than one year nor more than two years shall elapse between the date of notice of removal and the term of removal first in date;

(*b*) In the case of leases of lands exceeding two acres in extent, whether such leases be written or verbal, held from year to year or under tacit relocation, or for any other period less than three years, an interval of not less than six months shall elapse between the date of notice of removal and the term of removal first in date; and

(*c*) In the case of houses let with or without land attached not exceeding two acres in extent, as also of land not exceeding two acres in extent without houses, as also of mills, fishings, shootings, and all other heritable subjects excepting land exceeding two acres in extent, and let for a year or more, forty days at least shall elapse between the date of notice of removal and the term of removal first in date.

Provided that nothing herein contained shall affect section 27 of the Agricultural Holdings Act, 1883: Provided also that in any defended action of removing, the sheriff may order the defender to find caution for

violent profits: Provided also that in actions of declarator of irritancy and removing by a superior against a vassal, the pursuer shall call as parties the last entered vassal and such heritable creditors and holders of postponed ground burdens as are disclosed by a search for twenty years prior to the raising of the action, and the expense of the search shall form part of pursuer's expenses of process.

111. Form of Notice of Removal.—Notices under sections 34, 35, and 36 of this Act shall be as nearly as may be in the Form H annexed hereto, and a letter of removal may be in the terms of Form I.

112. Form of Notice under Section 37.—Notices under section 37 of this Act shall be as nearly as may be in the Form J hereto annexed, and such form may be used, *mutatis mutandis*, also for notices to the proprietor by or on behalf of the tenant.

113. Removal Notices.—Removal notices under sections 34, 35, 36, 37, and 38 of the Act may be given by a messenger-at-arms or sheriff officer, or by registered letter signed by the person entitled to give such notice, or by the law agent or factor of such person, posted at any post office within the United Kingdom in time to admit of its being delivered at the address thereon on or prior to the last date upon which by law such notice must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person at the time if the same be known, or, if the same be not known, then to the last known address of such person.

114. Evidence of Notice to Remove.—A certificate of notice under rule 111, dated and endorsed upon the lease or extract, or upon the letter of removal, and signed by the sheriff officer, messenger-at-arms, or by the person giving the notice, or his law agent, or factor, or an acknowledgment of notice endorsed on the lease or extract or letter of removal by the party in possession or his agent, shall be sufficient evidence that notice has been given. Where there is no lease, a certificate endorsed upon a copy of the notice or letter, certified to be correct, by the person, sheriff officer, messenger-at-arms, law agent, or factor sending the same, which certificate shall be signed by such party sending the notice or letter, shall also be sufficient evidence that notice has been given. A certificate of notice under rule 112, dated and endorsed upon a copy of the notice or letter signed by the party sending the notice, shall be sufficient evidence that such notice has been given.

### Summary Removings

115. Form of Action for Summary Removing. — The action for summary removing as authorised by section 38 of this Act may be at the instance of a proprietor or his factor, or any other person by law authorised to pursue a process of removing, and be in the Form K hereto annexed.

116. Form of Warrant.—The warrant to be granted thereon may be in the Form B hereto annexed upon two days' *inducice*, and may be signed by the sheriff-clerk.

117. Decree in Absence may be Recalled within Three Days.—If the defender fail to appear, the sheriff may dispose of the cause in his absence, but if within three days the defender shall satisfy the sheriff that there was reasonable excuse for his non-appearance, the sheriff may re-hear the cause, and if decree has been granted and not implemented, may recall the decree upon such conditions as to expenses and otherwise as the sheriff shall deem reasonable. Where decree is pronounced in absence, the

sheriff may give such directions as he may deem proper for the preservation of the defender's goods and effects.

118. Service Copy Warrant Sufficient to Cite Witnesses.—The warrant upon the petition or complaint or the defender's service copy thereof shall be sufficient warrant for the citation of witnesses.

119. Small Debts Procedure Applies to Summary Removing.—Such causes shall be conducted and disposed of in the summary manner in which proceedings are conducted under the Small Debt Acts, and shall not be subject to review.

120. Form of Decree.—When decree and warrant of ejection is granted, it shall be in the Form L hereto annexed.

121. Sheriff may Order Caution.—The sheriff may order written answers or adjourn the hearing of such causes, but where defences cannot be instantly verified, the sheriff shall ordain the defender to find caution for violent profits, unless the sheriff shall dispense with caution, which he may do if he see fit.

122. When Caution Found, Procedure as Ordinary Action.—Where a defender has given in answers, and caution for violent profits has been found or has been dispensed with, such causes shall, as nearly as may be, thereafter be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form.

### Summary Suspension

123. Summary Application for Suspension of Charge may be Brought in Court of Defender's Domicile.—Where a charge has been given on a decree of court granted by the sheriff or a decree of registration proceeding upon a bond, bill, contract, or other form of obligation registered in any Sheriff Court books, or in the books of council and session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding fifty pounds, exclusive of interest and expenses, the person so charged may apply in the Sheriff Court of his domicile for suspension on caution of such charge and diligence.

124. Diligence may be Sisted on Caution.—On sufficient caution being found in the hands of the sheriff-clerk for the sum charged for interest and expenses, and a sum to be fixed by the sheriff in respect of expenses to be incurred in the suspension process, the sheriff may sist diligence, order intimation and answers, and proceed to dispose of the cause in a summary manner.

125. Judgment of Sheriff Final on Competency.—If objections be taken to the competency or regularity of suspension proceedings, the judgment of the sheriff-substitute, on such objections, may be appealed to the sheriff, but his judgment thereon shall be final.

### Arrestment

126. When Arrestment Schedule not served Personally, Copy to be sent by Post.—If a schedule of arrestment has not been personally served upon an arrestee, it shall be necessary to make the arrestment effectual that a copy of the schedule be also sent by postal registered letter to the last known place of abode of the arrestee, or if such place of abode is unknown, or if the arrestee is a firm or corporation, to the arrestee's principal place of business if known, or, if not known, to any

known place of business of the arrestee, and the officer shall in his execution certify that this has been done, and specify the said address.

127. Arrestment to be Reported.—An arrestment used on the dependence shall fall, unless the action shall have been served within seven days of the date of execution of arrestment and tabled within fourteen days after service, and when an arrestment has been executed, the party using it or his agent shall forthwith report the execution to the sheriff-clerk.

### Forthcoming and Multiplepoinding

128. Forum of Action of Multiplepoinding.—An action of forthcoming or multiplepoinding may be raised in the sheriffdom where the fund or subject *in medio* is situated, or in that to whose jurisdiction the arrestee or the holder of the fund is subject, although the common debtor may not reside within either sheriffdom.

129. Real Raiser to be Set Forth.—The party raising an action of multiplepoinding shall set forth in the initial writ who is the real raiser. The sheriff may, in an action of multiplepoinding, allow the real raiser his expenses, preferably out of the fund *in medio*; and, in an action of furthcoming, the expenses of bringing the action shall be deemed to be part of the arrestor's claim, which may be made good out of the arrested fund or subject.

130. Claims to be Ordered.—Where, in an action of multiplepoinding, no defences are stated, and where defences are stated and repelled, the sheriff shall order claims and, if necessary, answers within a short space.

131. Several Claimants may state One Paper.—Several claimants may state the facts on which they base their claims on the same paper, but, where necessary, they shall append separate claims and separate pleas in law.

132. When Competing Claims, Procedure as in Ordinary Action.—Where there are defences in an action of furthcoming or competing claims in a multiplepoinding process, the procedure shall be as near as may be that in ordinary actions where defences have been lodged.

### Jury Trial

133. Jury.—The jury shall consist of two special and five common jurors, who shall be chosen from a panel of five special and ten common jurors to be cited for the diet.

134. Citation of Jury.—The jury shall be cited by the sheriff-clerk from the Sheriff Court jury book in the manner prescribed by law or in use to be followed for the citation of jurors in Scotland; and all statutory or other regulations and customs relative to the citation, non-attendance, selection and swearing of jurors shall (subject to rule 135) apply to jury trial in the Sheriff Court.

135. Challenge of Jurors.—Each party in the cause shall have right to challenge one special and one common juror, but not more; and in this matter, where there are more pursuers or defenders than one, they shall act collectively and not individually.

136. Jury to have Copy Issue.—Each juror empanelled shall, at the commencement of the trial, be supplied by the pursuer with a copy of the questions of fact proponed as set forth in the sheriff's interlocutor.

137. Practice in Proofs to Apply.—The law and practice relating to the taking of evidence in proofs before the sheriffs shall apply to jury trials. Unless all the parties appearing put in a minute (which may be signed by their agents) dispensing with a record of the proceedings, the same shall be taken by an official shorthand writer of the court, but the notes need not be extended unless, in the case of an appeal, their production shall be ordered by the appellate court, in which event it shall be the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to lodge the same with the principal clerk of session.

138. Evidence on Commission.—When evidence has been taken to lie *in retentis*, if the sheriff is satisfied that the deponing witness is dead, or that he cannot attend at the trial owing to absence or infirmity or other sufficient cause, it shall be competent for the sheriff, on the motion of any party in the cause (irrespective of which party moved for the commission to take such evidence) to direct that the report of the commission be read to the jury, and when so read such report shall form part of the evidence in the cause; but depositions shall not be read or referred to if the deponing witness attends at the trial.

139. Exceptions.—Exceptions taken in the course of the trial to rulings of the sheriff in regard to admission or rejection of evidence, or in regard to points of law laid down in the course of the trial or in the sheriff's charge to the jury, shall, if required by the party taking the exception, be recorded to the sheriff's dictation upon the official shorthand notes before the jury proceed to consider their verdict.

140. Addressing Jury.—No person shall be entitled to address the jury until the leading of evidence has been concluded; but thereafter the parties, personally or by counsel or law agent, may address the jury. One speech only on behalf of each interest represented shall be made.

141. Charge to Jury.—If the sheriff deem it necessary to charge the jury, he shall do so immediately after, or as soon as practicable after, the conclusion of the speeches, or, if none be made, after the conclusion of the evidence.

142. Productions.—Documents or productions intended to be put in evidence or referred to at the trial shall be lodged with the clerk of court four days before the date fixed for the trial, but the sheriff may allow productions to be exhibited and produced at the trial if he is satisfied that they could not reasonably have been lodged earlier and that reasonable notice had been given to the other parties of intention to produce at the trial.

143. Verdict by Majority.—The jury may return a verdict by a majority of its number at any time not less than one hour after the jury has been enclosed.

144. Form of Verdict.—The verdict of the jury shall be returned in the form of specific answers to the questions proponed by the sheriff, with the addition of a statement of the amount at which they assess the damages in the event of damages being awarded.

145. Verdict to be Recorded.—The verdict returned by the jury shall be recorded upon the interlocutor sheets, and signed by the clerk of the court, and this having been done, the jury shall be discharged.

146. And Followed by Interlocutor.—Any party in the cause may, so soon as the verdict has been so recorded or within fourteen days thereafter, move the sheriff to apply the verdict, and upon this motion the

sheriff may hear parties and may make avizandum. As soon as practicable the sheriff shall issue an interlocutor applying the verdict, and grant decree accordingly. In this interlocutor the sheriff shall also dispose of the question of expenses.

147. Interlocutor Final if no Shorthand Notes.—Where no shorthand notes of the proceedings have been taken, the interlocutor applying the verdict shall not be subject to review.

148. Grounds of Appeal to Court of Session.—If shorthand notes have been taken, it shall be competent for any party in the cause, within fourteen days after the date of the final interlocutor of the sheriff applying the verdict (but not later), to appeal to a Division of the Court of Session by lodging with the sheriff-clerk a note of appeal in the Form M annexed hereto.

149. Transmission of Process.—The sheriff-clerk shall, within three days of his receiving the note of appeal, notify the other parties in the cause, and transmit the process to the principal clerk of session at Edinburgh.

150. New Trial.—If the court shall order a new trial, the principal clerk of session shall retransmit the process to the sheriff-clerk, and the sheriff shall as soon as practicable fix a date of new trial, which shall proceed as herein directed as regards the original trial.

## Charge

151. Charge against a Corporation.—A company, corporation, association, or firm, or a board corporate or unincorporate, may be competently charged under their nominate or descriptive name at their principal place of business (which term shall include the office or place of business of the clerk or secretary of any board or corporation), or, where their principal place of business is furth of Scotland, at any place of business in Scotland.

## The Poor's Roll

152. Agents to Meet to Nominate Agents for Poor.—The sheriff shall annually make an order appointing the agents enrolled in his court (or, where the sheriffdom is divided into districts having separate local courts, the agents enrolled in the district courts) to meet to nominate a specified number of agents for the poor.

153. Notice of Meeting on Court-House Walls.—Notice of such order shall be given by a copy thereof being affixed on the walls of the court-houses and sheriff-clerk's offices in the sheriffdom.

154. Nomination to be Reported to Sheriff.—At said meeting the agents present shall, by a majority of votes, nominate the required number of agents, and cause the nominations to be reported to the sheriff.

155. Sheriff may Confirm or Refuse.—The sheriff shall have power to confirm the nominations, in whole or in part, or to decline to do so.

156. Notice to Agents.—Six days before the list is submitted to the sheriff, the sheriff-clerk shall notify each agent who has been nominated, and such agent may, before the nominations are confirmed, represent to the sheriff any reason why his nomination should not be confirmed.

157. If Agents Fail to do so, Sheriffs may Nominate.—In the

event of the agents failing to nominate as above provided for, or the sheriff not confirming the nomination, the sheriff may himself make the requisite nomination, or may appoint another meeting to be held.

158. Agents to Act for one Year.—The agents nominated shall act as agents for the poor in the sheriffdom, or the district in which they are appointed, for one year, but they shall be eligible for renomination.

159. Agents to Act as Directed by Sheriff.—The agents so nominated shall as they themselves arrange, or as the sheriff shall direct, act as procurators for the poor in all causes, civil and criminal, including attendance at the circuit court.

160. Agents to Assist each Other.—The agents for the poor, in their respective districts, shall assist each other by taking precognitions, or proofs on commission, or otherwise as may be requisite and reasonable.

161. In sections 152 to 157 "sheriff" does not include sheriff-substitute.

162. Applicant to Produce Certificate of Poverty.—Along with his application for the benefit of the poor's roll, the applicant shall produce a certificate signed by the inspector or an assistant inspector of poor of the parish or district where the applicant resides, bearing that the applicant is unable, through poverty, to pay for the conduct of legal proceedings.

163. Application to be Remitted to Procurators for Poor.—The sheriff shall remit the application to the procurators for the poor, who shall notify the parties, and after inquiry shall make a report to the sheriff.

164. If they Report Applicant Entitled, Sheriff to Appoint an Agent to Conduct Cause.—If they report that the applicant has a probable cause of action and is entitled to the benefit of the poor's roll, the sheriff shall appoint one of the agents to take charge of the applicant's case.

165. Agent to Conclude Cause.—Such agent shall conduct the cause to its final issue, notwithstanding that during its progress he may have ceased to be an agent for the poor.

166. Agent to have no Claim for Fees unless Recovered from Other Party.—Unless expenses shall be awarded against and recovered from the opposite party, the agent shall have no claim for fees; but the litigant shall be liable to him for actual outlays incurred with the litigant's sanction.

167. Agent not Liable for Fees.—The agent shall not be liable for witnesses' fees, shorthand writers' fees, or court dues, unless they are recovered by the agent personally.

168. Agent not Liable for Court Dues.—Neither the agent nor the litigant shall be liable for dues of court or officers' fees, unless these are awarded against and recovered from the opposite party, in which case the litigant (or the agent, if he personally recovers the same) shall be liable.

169. Sheriff may Remove Litigant from Poor's Roll.—It shall be in the power of the sheriff at any time to deprive any litigant of the benefit of the poor's roll.

## Form A

Sheriffdom of at

*A. B.* [*design him; if he sues in any special character set that forth; as also where necessary relationship to defender*, e.g., *wife of defender or a creditor of defender, etc.*],
*Pursuer.*

*Against*

*C. D.* [*design him; if sued in any special character set that forth*, e.g., *as trustee, or as vitious intromitter, etc.*],
*Defender.*

The claim or demand or complaint of the pursuer is [*here state shortly the general nature of the claim or demand or ground of appeal or cause of action, as for example:—*

(*a*) For payment of £ for goods sold and delivered (or otherwise) conform to account hereto annexed.
(*b*) For delivery of.
(*c*) For an accounting with defender as [*state character in which defender is liable to account*].
(*d*) For exoneration as holder of [*state fund or subject* in medio].
(*e*) For declarator that
(*f*) For warrant to
(*g*) For sequestration (*for rent or in bankruptcy*).
(*h*) For recall of arrestments (*used by defender in the hands of, etc.*).
(*i*) For letters of arrestment *ad fundandam jurisdictionem.*
(*j*) For confirmation of by-laws.
(*k*) For appointment of judicial factor.
(*l*) That defender be ordained to (*execute work, sign deeds, remove or as the case may be*).
(*m*) That pursuer is aggrieved by (*state shortly nature of by-law, order, etc., appealed against*).
(*n*) (*Otherwise as the case may be*).]

Therefore the pursuer craves the Court [*here set forth the specific decree, warrant, or order asked, giving all the particulars to be embodied (if necessary) in an extract*].

(*To be signed*) *A. B.*, Pursuer;
*or*
*X. Y.* [*add designation and business address*].
Pursuer's Agent.]

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## Form B

[*Place and date.*] Grants warrant to cite the defender [*or respondent*] by serving a copy of the writ and warrant upon an *inducice* of , and appoints him to answer within the sheriff court-house at [*in Room No. , or in Chambers, or as the case may be*], on the day of at o'clock noon, under certification of being held as confessed. [When necessary add (meantime sequestrates and grants warrant to inventory and secure); or (grants warrant to arrest on the dependence) or (otherwise as the case may be).]

FORM C

[*Place and date.*] Grants warrant to cite the defender by serving a copy of the writ and warrant upon an *inducia* of days, and appoints him, if he intend to defend, to lodge a notice of appearance with the sheriff-clerk at within the *inducia*, under certification of being held as confessed. [*Meantime grants interim interdict, or warrant to arrest on the dependence, or sequestrates and grants warrant to inventory; or otherwise, as the case may be.*]

FORM D

[*Place and date, and, if necessary, hour.*] *C. D.*, defender. You are hereby served with the foregoing [*or within-written*] writ and warrant, and required to answer thereto, conform to the said warrant. [*If posted and if necessary add* (*the* induciæ *is reckoned from twenty-four hours after date of posting*).]

(*To be signed*) *P. Q.*, Sheriff Officer,
*or*
*X. P.* [*add designation and business address*].
Pursuer's Agent.

FORM E

[*Place and date.*] I, , do hereby certify that upon the day of [*if necessary add between the hours of and* ] I duly cited *C. D.*, the defender [*or respondent*], to answer to the foregoing [*or within-written*] writ. This I did by [*set forth mode of service; if by officer and not by post, add in presence of L. M.* (*design him*), witness, hereto with me subscribing].

(*To be signed*) *P. Q.*, Sheriff Officer;
*L. M.*, Witness;
*or*
*X. Y.* [*add designation and business address*].
Pursuer's Agent.

FORM F

*K. L.* [*design him*], you are hereby required to attend at the Sheriff Court House at [*street address*] [*if necessary, add within Court Room, No. , or in Chambers*], on , the day of , at o'clock noon, to give evidence for pursuer [*or appellant or complainer*] [*or defender or respondent*] in the action *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], and [*if necessary*] you are required to bring with you [*specify documents*], under penalty of forty shillings if you fail to attend.

Dated this day of [*if necessary add between the hours of and noon*].

[*Signed*] *P. Q.*, Sheriff Officer;
*or*
*X. Y.* [*add designation and business address*].
Pursuer's [*or defender's or appellant's or respondent's*] Agent.

FORM G

[*Place and date.*] I, do hereby certify that upon the day of [*if necessary, add between the hours of and noon*], I duly cited *K. L.* [*design him*], to attend at o'clock noon, within to give evidence for the in the action *A. B.* [*design him*], against *C. D.* [*design him*], and I also required him to bring with him [*specify documents*]. This I did by [*set forth mode of citation*].

[*Signed*] *P. Q.*, Sheriff Officer;

*or*

*X. Y.* [*add designation and business address*].

Pursuer's [*or defender's or appellant's or respondent's*] Agent.

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FORM H

To [*name, designation, and address of party in possession*].

You are required to remove from [*describe subjects*] at the term of [*or if different terms, state them and the subjects to which they apply*], in terms of lease [*describe it*] or [*in terms of your letter of removal of date* ] or [*otherwise as case may be*].

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FORM I

To [*name and designation of addressee*].

[*Place and date*]. I am to remove from [*state subjects by usual name or short description sufficient for identification*] at the term of

*K. L.* [*add designation and address*].

If not holograph, to be attested thus—

*M. N.* [*add designation and address*], witness.

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FORM J

[*Place and date*].

You are required to remove from [ ] that portion of ground [*describe it*]; *or* the mill of [*describe it*]; *or* the shootings of the lands and estate of [*describe them*]; *or* [*other subjects to which this notice is applicable*], at the term of Whitsunday [*insert year*] [*or Martinmas, as the case may be, inserting after the year the words, being the* 15*th day of May*, or *the* 11*th day of November*, or *the* 28*th day of May*, or *the* 28*th day of November, as the case may be*].

To *K. L.* [*designation and address*].

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FORM K

In the Sheriff Court of

at

*A. B.* [*design him*], pursuer, complains that he [*or his author, as the case may be*], let to *C. D.* [*design him*], defender [*or his author, as the case may*

*be*], a dwelling-house, garden, and pertinents [*or other subjects, as the case may be*], situated at , for the period from to , and that the defender refuses or delays to remove therefrom, although his term of occupancy has expired, and it is necessary to obtain warrant for his ejection; therefore decree ought to be granted for removing and ejecting the defender, his family, sub-tenants, cottars, and dependants, with their goods and gear, furth and from the said subjects [*here insert date at which removal or ejection is sought*], that the pursuer or others in his right may then enter to and possess the same. [*If expenses are sought add, "and the defender ought to be found liable in the expenses of process and dues of extract."*]

[*Signature of pursuer or his agent.*]

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FORM L

At the day of the sheriff [*in absence of defender, or having heard parties, as the case may be*] grants warrant for ejecting the said *C. D.*, defender, and others mentioned in the complaint from the subjects therein specified, such ejection not being sooner than [*here insert time appointed for ejection, and whether after a charge on such inducie as may be deemed proper or instantly*]: Finds the defender liable in of expenses [*or otherwise, as the case may be*] and decerns.

[*Signature of Sheriff.*]

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FORM M

At the jury trial in the action at the instance of *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], defender, held at , on the day of , before sheriff [substitute], of

The questions of fact proponed to the jury, and their answers thereto, were as follows:—

*Question* 1. [*State it per sheriff's interlocutor.*]

*Answer* 1. [*State it per the recorded verdict of the jury.*]

. . . . . .

The jury awarded damages to , and assessed the same at £ .

The sheriff on pronounced the interlocutor, a copy of which is appended hereto.

The [*state party appealing*] appeals to the Division of the Court of Session upon the ground [*here state the grounds conform to section 31 of the Act*].

(*a*) That in the interlocutor complained of the verdict was erroneously applied.

(*b*) That the verdict of the jury was contrary to evidence in respect [*here set forth clearly and succinctly the particulars in which it is alleged the evidence led and the verdict returned are inconsistent*].

(*c*) That evidence was unduly admitted [*or rejected*] in regard to [*here set forth shortly the fact in regard to which the evidence was admitted or rejected.*]

(*d*) That the sheriff misdirected the jury in regard to [*here state shortly the point of law alleged to be misdirection*].

(*e*) That the damages awarded by the jury were excessive.

*M. P.*, pursuer [*or other party*],
or
*X. Y.* [*signature and business address*],
Agent for the

Appendix. [*Here copy interlocutor appealed against.*]

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## SECOND SCHEDULE (s. 52)

| Session and Chapter. | Short Title. | Extent of Repeal. |
|---|---|---|
| 20 Geo. 2. c. 43. | The Heritable Jurisdictions (Scotland) Act, 1746. | Section 29. |
| 21 Geo. 2. c. 19. | The Sheriffs (Scotland) Act, 1747. | Sections 10 and 11. |
| 28 Geo. 2. c. 7. | The Sheriffs (Scotland) Act, 1755. | The whole Act. |
| 50 Geo. 3. c. 112. | The Court of Session Act, 1810. | Sections 36, 37, 38, and 40, so far as these sections relate to Sheriff Court. |
| 6 Geo. 4. c. 23. | The Sheriff Courts (Scotland) Act, 1825. | Sections 1, 3, 4, 5, and 8, so far as these sections relate to civil causes in the Sheriff Court, and section 10. |
| 6 Geo. 4. c. 120. | The Court of Session Act, 1825. | Section 40, so far as relating to appeal for jury trial from Sheriff Court to Court of Session. |
| 9 Geo. 4. c. 29. | The Circuit Courts (Scotland) Act, 1828. | Section 22. |
| 11 Geo. 4 and 1 W. 4. c. 69. | The Court of Session Act, 1830. | Sections 22, 23, 24, and 32, as also in section 33 the words "and all actions of separation *a mensâ et thoro.*" |
| 2 and 3 W. 4. c. 65. | The Representation of the People (Scotland) Act, 1832. | Section 36, so far as relating to sheriff and sheriff-substitute. |
| 1 and 2 Vict. c. 114. | The Debtors (Scotland) Act, 1838. | Section 19. |
| 1 and 2 Vict. c. 119. | The Sheriff Courts (Scotland) Act, 1838. | The whole Act, except sections 25, 27, and 28, and section 31, so far as that section relates to courts other than Sheriff Courts. |

| Session and Chapter. | Short Title. | Extent of Repeal. |
|---|---|---|
| 16 and 17 Vict. c. 80. | The Sheriff Courts (Scotland) Act, 1853. | The whole Act, except section 34. |
| 27 and 28 Vict. c. 106. | The Sheriffs Substitute Act, 1864. | The whole Act. |
| 30 and 31 Vict. c. 96. | The Debts Recovery (Scotland) Act, 1867. | The whole Act. |
| 31 and 32 Vict. c. 100. | The Court of Session Act, 1868. | Sections 65, 66, 67, 68, 69, 70, 73, and 79, so far as those sections relate to appeals from Sheriff Court. |
| 33 and 34 Vict. c. 86. | The Sheriff Courts (Scotland) Act, 1870. | Sections 13 and 14. |
| 38 and 39 Vict. c. 81. | The Sheriffs Substitute (Scotland) Act, 1875. | Sections 1 and 2. |
| 39 and 40 Vict. c. 70. | The Sheriff Courts (Scotland) Act, 1876. | Sections 4 to 25, both inclusive.<br>Sections 27 to 34, both inclusive.<br>Sections 46 to 52, both inclusive.<br>Section 54, except in so far as it relates to commissary regulations.<br>All the schedules. |
| 40 and 41 Vict. c. 50. | The Sheriff Courts (Scotland) Act, 1877. | The whole Act. |
| 52 and 53 Vict. c. 26. | The Small Debt Amendment (Scotland) Act, 1889. | Section 8. |
| 61 and 62 Vict. c. 8. | The Sheriffs Tenure of Office (Scotland) Act, 1898. | The whole Act. |

# II. ACTS OF SEDERUNT

1. *Act of Sederunt regulating the Fees payable in the Sheriff Courts of Scotland, and prescribing the Form of Books of Account to be kept by Sheriff-Clerks.* [*7th March* 1908.]

THE Lords of Council and Session, in pursuance of the power vested in them by section 2 of the Courts of Law Fees (Scotland) Act 1895, and section 40 of the Sheriff Courts (Scotland) Act 1907, do enact that on and after the first day of April 1908 the Act of Sederunt of 20th December 1898, and so much of the two Acts of Sederunt of 7th July 1904, and of the Act of Sederunt of 26th June 1907, as relates to fees payable in the Sheriff Courts of Scotland shall be and are by this Act repealed; and in lieu thereof it is hereby enacted :—

1. On and after the first day of April 1908, Sheriff-Clerks shall be entitled to charge the fees specified in the tables hereto annexed in place of the fees hitherto chargeable by them, and no other or higher fees shall be charged by them, nor shall any addition be made thereto in respect of postage or otherwise.

2. Sheriff-Clerks shall be responsible for the collection of all fees specified in the tables, and it shall be their duty to refuse to receive any paper chargeable with a fee, or to transmit any service or petition for completion of title for extract, or to allow any marking of an appeal, or other marking to be made in respect of which a fee is payable, unless the appropriate fee has been paid; and it shall further be their duty, when a fee is declared payable prior to any particular step being taken in a process, and such fee has not been paid by either party, to call the attention of the Sheriff to the matter, and the Sheriff, unless the fee is thereupon paid, shall proceed with the case as if the party by whom the unpaid fee is payable were absent or in default.

3. The fee in section 1 of Part I. shall cover extract. The *ad valorem* fees in section 3 of Part I. shall cover all proceedings including correspondence, but not including petitions for appointment of executor, for restriction of caution, or for special warrants. The fee in section 6 of Part II. shall cover all proceedings including extract, but not including appeal. The fees in sections 7 to 18 inclusive and 27 to 32 inclusive of Part II. shall cover all proceedings including, in bankruptcy cases, the necessary extracts and abbreviates for the Accountant of Court and other Government Departments. The fees in sections 19 and 20 of Part II. shall cover all proceedings including extract, but not including stated case. The fees in sections 21 to 26 inclusive of Part II. shall cover all proceedings, except appeal or stated case, in any action or proceeding for which special fees are not provided elsewhere. In criminal cases at the instance of a private prosecutor, when more persons than one are proceeded against in

one complaint, the fee shall cover one extract conviction or order in respect of each person.

Any subsequent extracts or copies required shall be charged under section 4 of Part I., or section 1 of Part II. In litigated commissary, service of heirs, and bankruptcy cases, the same fees shall be charged as for similar business in the ordinary Sheriff Court.

When a small debt case is remitted to the ordinary roll, the parties shall pay fees as for an ordinary action, under deduction of any fees already paid.

4. No fees shall be payable in the first instance by any officer of the Crown in proceedings the expenses of which are payable by the Crown. When, however, such officer is found entitled to expenses, the Court fees shall be included and decerned for.

5. No fees shall be payable in cases of *cessio bonorum*; in cases under the Workmen's Compensation Act, except stated cases or applications for reference to a medical referee; on applications under section 5 of the Dogs Act, 1906; on applications for relief under the Poor Laws; on petitions for leave to sue *in forma pauperis*; or on applications under the Acts for Registration of Births, Deaths, and Marriages, except those for registration of irregular marriages, or for warrant to record legitimation *per subsequens matrimonium*.

Parties allowed to sue or defend *in forma pauperis* shall be exempted from payment of fees in the first instance; but when they are found entitled to expenses, the Court fees shall be included and decerned for. Any party or agent recovering any of the said expenses shall be bound to account therefor *pro rata* to the Sheriff-Clerk.

At any time not exceeding six months after the close of the year of office of an agent for the poor, he shall prepare a list of the "Poor" cases in which he acted, showing the amount recovered by him, or by the parties represented by him, in each case. He shall then sign said list as a certificate of its correctness, and shall send the same to the Sheriff-Clerk, along with a remittance for the Court fees recovered by him. From time to time thereafter he shall remit to the Sheriff-Clerk the proper proportion of any further expenses recovered by him.

6. The Books of Account to be kept by Sheriff-Clerks shall be in the form of the schedules hereto annexed.

7. Bar Officers and the Macer of the Sheriff Court of Chancery shall be entitled to charge for their services the fees specified as "Bar Officers' Fees" in the tables hereto annexed.

8. In this Act and relative tables the following words shall include the meanings under mentioned:—

"Defender," "Compearer," and "Party," shall respectively include a set of Defenders, Compearers, and Parties with the same interest, for whom one First Paper has been lodged.

"Writ" and "Paper" shall include Inventory of Personal Estate, Summons, Petition, Application, Appeal bringing an Action into the Sheriff Court, Precept of Arrestment on a Liquid Document of Debt, Note of Objections, Notice of Appearance, Answers, Defences, Statement in writing, or other written Pleading, in a cause or proceeding.

"Decree" in section 26 of Part II. shall include Licence, Appointment, Discharge, Certificate of Registration of a Club, or other written statement of the Sheriff's decision in any proceeding under section 21 of Part II.

"Appeal" shall include the transfer of an action to the Court of Session at the instance of a party.
"Sheet" shall mean 250 words or part thereof.
"Sheriff" shall include Sheriff-Substitute.
"Sheriff-Clerk" shall include Commissary Clerk of Edinburgh, Sheriff-Clerk of Chancery, and Sheriff-Clerk Depute.

And the Lords Appoint this Act and the annexed Tables and Schedules to be inserted in the Books of Sederunt, and to be printed and published in common form.

DUNEDIN, *I.P.D.*

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## TABLE OF FEES FOR THE SHERIFF-CLERKS OF SCOTLAND

### *A.*—FEES TO BE COLLECTED BY SHERIFF-CLERKS AND ACCOUNTED FOR TO THE KING'S AND LORD TREASURER'S REMEMBRANCER

#### PART I.—COMMISSARY PROCEEDINGS

| | | £ | s. | d. |
|---|---|---|---|---|
| 1. | Petition for appointment of executor . . . | 0 | 10 | 0 |
| 2. | Petition for restriction of caution or for special warrant . | 0 | 5 | 0 |
| 3. | Receiving and examining inventory of personal estate— | | | |
| | *a.* Gross estate sworn not to exceed £500— | | | |
| | When the amount of the estate which may be confirmed does not exceed £20 . . . | 0 | 5 | 0 |
| | Exceeds £20, 5s. for the first £20, and 1s. for each £10 or part of £10 thereafter, maximum fee 15s. | | | |
| | *b.* Gross estate sworn not to exceed £500— | | | |
| | When the amount of the estate which may be confirmed— | | | |
| | (1) Does not exceed £500 . . . | 1 | 10 | 0 |
| | (2) Exceeds £500 and does not exceed £1000 | 2 | 10 | 0 |
| | (3) Exceeds £1000 and does not exceed £20,000, £2, 10s. for the first £1000, and 10s. for each £1000 or part of £1000 thereafter. | | | |
| | (4) Exceeds £20,000 and does not exceed £100,000, £12 for the first £20,000, and 10s. for each £5000 or part of £5000 thereafter. | | | |
| | (5) Exceeds £100,000, £20 for the first £100,000, and 10s. for each £10,000 or part of £10,000 thereafter. | | | |
| | *c.* Additional and corrective inventories and eiks shall be charged at the above rates on the additional estate which may be confirmed. | | | |
| | *d.* Where it is declared that confirmation is not required, fees at half the *ad valorem* rate shall be charged on receiving the inventory. If confirmation should subsequently be required, the remaining half of the fees shall then be charged. | | | |

| | | £ | s. | d. |
|---|---|---|---|---|
| 4. | Extract or copying, per sheet | £0 | 1 | 0 |
| 5. | Single search, to include inspection— | | | |
| | Within five years from date of search | 0 | 1 | 0 |
| | Beyond „ „ | 0 | 2 | 6 |
| 6. | *a.* Certifying English or Irish probates or letters of administration— | | | |
| | Gross estate sworn not to exceed £500 | 0 | 2 | 6 |
| | Other estates | 0 | 15 | 0 |
| | *b.* Sealing probates or letters of administration under the Colonial Probates Act, 1892— | | | |
| | Gross estate sworn not to exceed £500 | 0 | 15 | 0 |
| | Other estates, 15s., and fees at half the *ad valorem* rate in section 3*b*. | | | |

## Part II.—Sheriff Court Proceedings

### *General (applicable to all business under Part II.)*

| | | | | |
|---|---|---|---|---|
| 1. | Recording, extracting, or copying, per sheet | 0 | 1 | 0 |
| 2. | Single search, to include inspection, per hour | 0 | 1 | 0 |
| 3. | Inspection by a Trade Protection Society or Trade Publication, of Protests, Act books and Court Rolls— | | | |
| | Weekly for three months (payable in advance) | 0 | 10 | 0 |
| | Twice weekly for three months (payable in advance) | 1 | 0 | 0 |
| 4. | Appeal to Sheriff, Court of Session, or Court of Justiciary | 0 | 5 | 0 |
| 5. | Stated case | 1 | 10 | 0 |

### *Small Debt, and Summary Removings under Section 38 of the Sheriff Courts (Scotland) Act, 1907*

| | | | | |
|---|---|---|---|---|
| 6. | Summons, petition, or sist for rehearing | 0 | 3 | 0 |

### *Bankruptcy Proceedings*

| | | | | |
|---|---|---|---|---|
| 7. | Petition for sequestration of estates or conversion from a cessio | 1 | 0 | 0 |
| 8. | Act and warrant of trustee | 0 | 15 | 0 |
| 9. | Writing examination of bankrupt or minute of meeting, per sheet | 0 | 2 | 0 |
| 10. | Petition for trustee's discharge | 0 | 10 | 0 |
| 11. | Petition for bankrupt's discharge, or application for approval of composition or deed of arrangement | 0 | 15 | 0 |
| 12. | Request to act in aid of English Court of Bankruptcy | 0 | 5 | 0 |

### *Service of Heirs*

| | | | | |
|---|---|---|---|---|
| 13. | Petition for general or special service or completion of title, or note for a Crown or Prince's charter, writ or precept | 2 | 0 | 0 |

| | | | |
|---|---|---|---|
| 14. Proceedings for choosing curators, giving up inventories of minor's effects, or following on a brieve from Chancery . . . . . | £1 | 0 | 0 |

*Proceedings under the Acts for Registration of Births, Deaths, and Marriages*

| | | | |
|---|---|---|---|
| 15. Petition for registration of an irregular marriage or for warrant to record legitimation *per subsequens matrimonium* . . . . . | 0 | 5 | 0 |

*Summary Proceedings under the Poor Laws*

| | | | |
|---|---|---|---|
| 16. Any application or first paper except an application for relief . . . . . | 0 | 5 | 0 |

*Proceedings under the Lunacy Acts*

| | | | |
|---|---|---|---|
| 17. Any petition or first paper except as otherwise chargeable under Table B . . . . . | 0 | 5 | 0 |

*Inferior Courts Judgment Extension Act*

| | | | |
|---|---|---|---|
| 18. Any proceeding . . . . . | 0 | 5 | 0 |

*Summary Jurisdiction Acts*

| | | | |
|---|---|---|---|
| 19. Complaint . . . . . | 0 | 5 | 0 |

*Workmen's Compensation Act*

| | | | |
|---|---|---|---|
| 20. Application for reference to a medical referee . . | 0 | 5 | 0 |

*Ordinary and Miscellaneous*

| | | | |
|---|---|---|---|
| 21. Initial writ in any proceeding for which no special fee is provided elsewhere . . . . . | 0 | 5 | 0 |
| 22. First paper, reponing, or attendance to state a defence, each defender or compearer . . . . . | 0 | 5 | 0 |
| 23. Closing of the record, each party . . . . | 0 | 5 | 0 |
| 24. Proof, each party . . . . . | 0 | 5 | 0 |
| 25. Application for jury trial . . . . . | 1 | 0 | 0 |
| 26. Extract of decree . . . . . | 0 | 5 | 0 |
| 27. Caveat, to be in operation for one month . . . | 0 | 2 | 0 |
| 28. Sealing up repositories or the like, per hour . . | 0 | 5 | 0 |
| 29. Summary warrant for recovery of rates . . . | 0 | 5 | 0 |
| 30. Subscription of roll of law agents (each county) . . | 0 | 5 | 0 |
| 31. Recording protest of a bill or promissory note . . | 0 | 5 | 0 |
| 32. Lodging each set of plans or other parliamentary deposit . | 1 | 0 | 0 |

*B.*—Fees to be collected by Sheriff-Clerks, and accounted for as mentioned below

Inspections of Printed Abridgments, etc., sent to Sheriff-Clerks, under 31 & 32 Vict. c. 64

(To be accounted for to the Lord Clerk Register's Department.)

I. *For Inspection of the Printed Abridgments and Indexes of the Registers of Sasines (General and Particular) in County arrangement, and of the Printed Minutes and Indexes of each County Division of the General Register of Sasines, there shall be charged the following Fees, viz.:—*

1. For any period of not more than one year, a fee of 2s.
2. For any period extending from one year to ten years inclusive, a fee of 4s.
3. For any period extending from eleven to forty years inclusive, a fee of 10s.
4. For periods exceeding forty years, a further fee at the same rate as the preceding.

II. *For Inspection of the Indexes of the Register of Abbreviates of Adjudications and the Registers of Inhibitions there shall be charged the following Fees, viz.:—*

1. For any period of not more than one year, a fee of 2s.
2. For any period extending from one year to ten years inclusive, a fee of 4s.
3. For any period extending from eleven to forty years inclusive, a fee of 10s.
4. For periods exceeding forty years, a further fee at the same rate as the preceding.

Proceedings under the Lunacy Acts

(To be accounted for to the General Board of Lunacy.)

| | | | |
|---|---|---|---|
| 1. For order of admission granted by the Sheriff into a public or district asylum of a lunatic not being a pauper . . . . . | £0 | 5 | 0 |
| 2. For similar order for a pauper lunatic . . . | 0 | 2 | 6 |

Chancery Extracts

Sheriff-Clerks, other than the Sheriff-Clerk of Chancery, shall as heretofore collect and account for to the Director of Chancery the fees of Extracts coming from his department.

*C.*—Bar Officers' Fees

| | | | |
|---|---|---|---|
| 1. For each summons and sist in the Small Debt Court, and for each summary removing and rehearing . . | £0 | 0 | 1 |

| | | | |
|---|---|---|---|
| 2. For proceedings under the Summary Jurisdiction Acts, 1864 and 1881— | | | |
| For whole proceedings if proof led . . . | £0 | 1 | 0 |
| For whole proceedings if proof not led . . | 0 | 0 | 6 |
| 3. For each leading writ initiating a civil action or proceeding in any other department of the Sheriff Court . . . . . | 0 | 1 | 0 |
| 4. For attending each examination of bankrupt or witnesses in bankruptcy . . . . . | 0 | 2 | 0 |
| 5. For attending proofs other than those under the Small Debt and Summary Jurisdiction Acts, per hour . | 0 | 1 | 0 |
| (Payable in the first instance by the parties equally.) | | | |
| 6. Fee to the Macer of the Sheriff Court of Chancery for each petition carried through therein . . . | 0 | 2 | 0 |

*Schedule A.—Commissary Fees*

SHERIFF-CLERK'S OFFICE_____

| Date. | Description. | Name of Deceased. | Agent. | Fees. | Daily Totals. |
|---|---|---|---|---|---|
| | | | | £ s. d. | £ s. d. |
| | | | | | |

*Schedule B.—Sheriff Court Fees*

SHERIFF-CLERK'S OFFICE_____

| Date. | Paper, etc. | Register and Number. | Name of Case. | Agent. | Small Debt Fees. | Fees for Cases in "A" Register. | Fees for other Business. | Daily Totals. | Remarks. |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | £ s. d. | £ s. d. | £ s. d. | £ s. d. | |
| | | | | | | | | | |

2. *Act of Sederunt regulating the Fees of Agents and others in the Sheriff Court.* [*Edinburgh, 10th April* 1908.]

The Lords of Council and Session, considering that by section 40 of the Sheriff Courts (Scotland) Act, 1907, it is provided that—

> The Court of Session may from time to time, by Act of Sederunt, make such regulations not inconsistent with the provisions of this Act as may be necessary for carrying into effect the purposes thereof for regulating the practice of the Sheriff Courts (including diligence and procedure under the Small Debt Acts); and for regulating the fees of agents, officers, shorthand writers, and others, and, with the concurrence of the Treasury, for regulating the fees of Court; and for altering, amending, or adding to the rules of procedure in the first schedule hereto: Provided that at least two weeks before the same is signed the terms of the proposed Act of Sederunt shall be published in the *Edinburgh Gazette* and at least two other newspapers in Scotland: Provided also that every such Act of Sederunt shall, within one week from the date thereof, be transmitted by the Lord President of the Court of Session to the Secretary for Scotland, in order that it may be laid before the Houses of Parliament; and if either of the Houses of Parliament shall within thirty-six days after it has been laid before them resolve that the whole or any part of such Act of Sederunt ought not to continue in force, the whole or such part thereof as shall be included in such resolution shall from and after the date of the passing of such resolution cease to be binding.

And considering that in consequence of the alterations on the forms of process introduced by the said Act and of the extensions of the jurisdiction therein made, it is expedient to alter the Act of Sederunt of 4th December 1878, regulating the fees of procurators in the Sheriff Courts: Do therefore, in virtue of the powers conferred by the said Act of Parliament, provide and enact that, in place of the Regulations and Table of Fees annexed to the said Act of Sederunt, the Regulations and Table of Fees hereto annexed shall, in actions begun after 1st May 1908, regulate the fees of Agents and others in the Sheriff Courts in Scotland, until the same shall be altered by the Court; and the Regulations and Table of Fees authorised by this Act of Sederunt shall apply to expenses in proceedings under the Workmen's Compensation Act, 1906, begun after 1st May 1908; and the Lords appoint this Act and the Regulations and Table of Fees hereto annexed to be engrossed in the Books of Sederunt, and printed and published in common form.

### General Regulations

I. In the ordinary Sheriff Court, except as after stated, there shall be two scales of taxation, viz., *first*, for causes where the amount of principal concluded for does not exceed £50; and *second*, for causes exceeding that amount. In all cases the Sheriff may appoint that expenses shall be subject to modification.

II. (1) The scale for taxation shall in the ordinary case be determined by the principal sum concluded for, but in all cases it shall be competent

to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. (2) In cases where the principal sum concluded for does not exceed £50 it shall be competent to the Sheriff to direct taxation on the higher scale, if he shall be of opinion that such sum does not truly represent the nature and importance of the cause. (3) In actions of damages, the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct. (4) Where the demand made does not exceed the value which may be competently concluded for in the Small Debt Court, Small Debt expenses only shall be allowed, unless the Sheriff shall otherwise appoint. (5) Where the principal amount decerned for does not exceed £20 the Sheriff may allow Small Debt expenses only.

III. In jury trials, mercantile sequestrations, cessio proceedings, and executry business, there shall be one scale of taxation only, unless where otherwise hereinafter stated.

IV. In ordinary removings and ejections the scale of expenses shall be determined by the amount of the rent per annum. When the rent is not set forth as exceeding £50, the charges shall be according to Scale I.

V. In all actions where the pecuniary amount or value of the question in dispute cannot be ascertained from the process, the Sheriff shall determine according to which scale the account shall be taxed.

VI. In causes of great importance, or requiring much special preparation, it shall be in the discretion of the Sheriff to allow for a debate a higher fee than is allowed in the table, but not exceeding £7, 7s.; and that either by a direction in the interlocutor disposing of the cause, or by a special interlocutor following on a motion by the party found entitled to expenses. Where such fee is allowed, a similar fee shall be chargeable by each agent in the cause against his own client.

VII. In the Small Debt Court there shall be only one scale of taxation. When a case is remitted from the Small Debt to the Ordinary Court the fees thereafter chargeable by the agents shall be as specified in Scale I. of the Ordinary Court expenses.

VIII. This Table of Fees shall regulate the taxation of accounts, as well between agent and client as between party and party, but with this distinction, that where, as between party and party, general charges of limited amount, such as "Taking instructions" at the commencement of a case, "Instructions for Precognition," and "Process Fee" only are stated, it shall be in the option of the agent, as against his client, to substitute for these general fees detailed charges for all necessary business in connection with the case, the rates of charge being regulated by this table.

IX. The expenses to be charged against an opposite party shall be limited to proper expenses of process, without any allowance (beyond that specified in the table) for preliminary investigations, subject to this proviso, that precognitions, plans, analyses, reports, and the like (so far as relevant and necessary for proof of the matters in the record between the parties),

although taken or made before the raising of an action or the preparation of defences, or before proof is allowed, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor allowing a proof shall be pronounced.

X. In order that the expenses of litigation may be kept within proper and reasonable limits, only such expenses shall be allowed, in taxing accounts between party and party, as are necessary for conducting it in a proper manner, with due regard to economy. And it shall be competent to the Sheriff to disallow all charges for papers or parts of papers or particular procedure or agency which he shall judge irregular or unnecessary.

XI. Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts of the proceedings.

XII. Whenever an agent on one side attends any diet of proof, or debate, or any meeting ordered by the Sheriff, and the other is absent, or not prepared to proceed, the Sheriff shall have power to decern against the opposite party for payment of such expenses as the Sheriff may consider reasonable. If an appeal be abandoned, or any debate on preliminary pleas or otherwise ordered by the Sheriff be departed from by any party, and notice to that effect be given to the opposite party at least three lawful days before the date fixed for the hearing, no debate fee shall be allowed; but, failing such notice, a debate fee shall be allowed to the respondent's or other party's agent equal to one-half of the fee which would have been allowed had the debate proceeded.

XIII. When a remit shall be made by the Court regarding matters in the record between the parties to an accountant, engineer, or other reporter, the agents shall not, without special agreement, be personally responsible to the reporter for his remuneration, the parties alone being liable.

XIV. Agents acting for parties on the poor's roll shall not be liable for the charges or allowances to witnesses, sheriff-clerks, auditors, shorthand writers, sheriff-officers, or bar officers, unless they are recovered by the agent personally.

XV. References in any Statute or Act of Sederunt to the fees allowed in the Act of Sederunt of 4th December 1878 shall be held as referring to the fees allowed in the like circumstances in the Table of Fees annexed hereto.

DUNEDIN, *I.P.D.*

## TABLE OF FEES

### Chapter I.—General Business in Sheriff Courts

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| 1. *Taking Instructions* to conduct case of pursuers or defenders, including obtaining deliverance, borrowing and returning initial writ or petition, certifying same, entering or inquiring for appearance, making up interlocutor sheets and inventory of process and productions lodged with initial writs or petitions, and lodging same, and attendance at tabling or enrolment of case or at first diet in case, or getting endorsement on initial writ where no appearance entered | From £0 13 4 to 1 11 6 | From £1 1 0 to 2 2 0 |
| 2. *Drawing Papers* (the sheet throughout this table to consist of 250 words or numbers). | | |
| (1) Petitions, initial writs, counterclaims, condescendences, defences, answers, commissions, diligences against witnesses or havers, motions, minutes, specifications of documents, reclaiming petitions and answers, precognitions (including precognitions of parties), affidavits, caveats, statutory notices, and generally all necessary papers, per sheet . . . . | 0 4 0 | 0 6 0 |
| (2) Figured statements, per sheet . | 0 6 0 | 0 8 0 |
| (3) Inventories of productions not lodged with initial writ or petition, per sheet . . . . | 0 2 0 | 0 3 0 |
| (4) Framing (including fair copy) and lodging a caveat . . . | 0 6 8 | 0 10 0 |

(*a*) Papers shall be confined as closely as possible to statements of fact, but reference may be made where necessary to the record and to authorities cited, as well as to proofs, deeds, writings or correspondence produced, without the same being quoted at length; and if in any paper produced in a cause quotations of any kind exceeding one page each in length shall be made, the same shall be chargeable only at the rate of copying instead of drawing fees.

3. *Revising Papers where Revisal ordered.* One-half drawing fees.

| | Scale I. | Scale II. |
|---|---|---|
| 4. *Copying Papers*, including productions and precognitions, copy of the record for the use of the Sheriff, and copy correspondence when necessary or adjusted. | | |
| Written or typewritten copies— | | |
| (1) In English, per sheet | £0 1 0 | £0 1 6 |
| (2) In any other language, per sheet | 0 1 6 | 0 2 0 |
| (3) Figured States and Accounts, including account sued for, endorsed upon or attached to initial writ, and accounts of expenses, per sheet | 0 1 6 | 0 2 0 |
| (4) For each copy after the first, throughout this table, per sheet | 0 0 6 | 0 0 9 |

(*a*) A full copy shall be allowed of the record and interlocutors, and also of the proof and productions so far as necessary for the efficient conduct of the cause, and a further copy of the record up to the date of closing for the use of the Sheriff. In addition, a copy of every interlocutor disposing of questions of fact or law shall be allowed for the client.

| | | |
|---|---|---|
| 5. *Printing.* | | |
| (1) Instructing printer | £0 2 6 | £0 3 4 |
| (2) Revising proof, not exceeding 5 pages | 0 3 4 | 0 5 0 |
| (3) For every additional 5 pages | 0 1 8 | 0 2 6 |

(*a*) Where more than five copies of papers are necessary, the same shall be printed, and, if not printed, the charges for five copies only shall be allowed by the Auditor, or, in the option of the agent, a sum equivalent to the cost of printing.

| | | |
|---|---|---|
| 6. *Instructions to Messengers and Officers.* | | |
| Instructing messenger or officer to serve, execute or intimate the various kind of writs or diligence, including the examination of executions. | | |
| (1) For the first party on whom service or intimation is made | £0 2 6 | £0 3 4 |
| (2) For every other party | 0 0 6 | 0 0 6 |
| 7. *Citation of Witnesses.* | | |
| Making copy interlocutor fixing diet of proof or trial for citation of witnesses, and getting same certified by Clerk of Court | 0 3 4 | 0 5 0 |
| 8. *Productions.* | | |
| Where productions are lodged at any time other than at the tabling of a case, or at a diet of trial, or proof, lodging the same | 0 2 0 | 0 2 6 |

| | Scale I. | Scale II. |
|---|---|---|
| 9. *Closing of Record.* | | |
| Preparing for and attendance at closing of record, including examination of pleadings and productions . . . | From £0 10 6 to 1 1 0 | From £1 1 0 to 2 2 0 |
| 10. *Precognitions.* | | |
| Instructions for precognitions . . | From 0 13 4 to 1 1 0 | From 1 1 0 to 1 11 6 |

(*a*) In addition, reasonable travelling and personal expenses shall be allowed as for the nearest local agent, but no charge shall be allowed for journeys and attendances over and above the instruction fee.

(*b*) No charge shall be allowed for precognitions of witnesses not examined, in the absence of a good and valid reason for such non-examination, and at the audit all precognitions charged shall be produced.

(*c*) Each agent shall be entitled to charge for a full copy for his own use of the precognitions necessarily taken.

(*d*) Where a skilled witness prepares his own precognition or report, the agent shall be allowed half drawing fees for revising and adjusting it.

| | | |
|---|---|---|
| 11. *Proof, etc.* | | |
| (1) Preparing for proof . . . | From £0 13 4 to 1 1 0 | From £1 1 0 to 1 11 6 |
| (2) Attendance at and conducting proof before Sheriff or Commissioner, per hour (in addition to debate fee) . . . | 0 6 8 | 0 10 0 |
| 12. *Attendances.* | | |
| (1) If at the Court or in the town or place where the agent practises, or its neighbourhood, not exceeding half an hour . . | 0 5 0 | 0 6 8 |
| Exceeding half an hour but not exceeding an hour . . | 0 6 8 | 0 10 0 |
| For every half-hour thereafter . | 0 3 4 | 0 5 0 |
| (2) If at a distance therefrom, for the time occupied in such business and in travelling, at a rate not exceeding for a whole day . | 3 3 0 | 4 4 0 |
| (3) Besides reasonable travelling charges and also an allowance | | |

| | Scale I. | Scale II. |
|---|---|---|
| for maintenance, the latter at a rate not exceeding, per day . | £1 1 0 | £1 11 6 |

(*a*) Where the business can be properly performed by a local agent, the Auditor shall only allow such expenses as would have been incurred if it had been done by the nearest local agent, including reasonable fees for instructing him.

| | | |
|---|---|---|
| (4) Attendance at a visitation or inspection ordered by the Court; or on an accountant or other person to whom a remit has been made; or making searches of any of the public records, not exceeding an hour . . | 0 6 8 | 0 10 0 |
| For every half-hour thereafter . | 0 3 4 | 0 5 0 |

(*b*) Where a diet (other than a proof or debate) is continued only one attendance shall be chargeable.

| | | |
|---|---|---|
| (5) Attendance lodging application and procuring deliverance on any application where a special warrant, other than a warrant of service, is procured, *e.g.* interim interdict or sequestration . | 0 5 0 | 0 6 8 |
| Allowance for time of clerk necessarily occupied— | | |
| (6) If in town or place where agent practises, or its immediate neighbourhood, per hour . . | 0 3 4 | 0 5 0 |
| (7) At a distance, per day . . | 1 1 0 | 1 11 6 |
| (8) In addition, reasonable travelling charges and personal expenses, the latter not exceeding, per day . . . . | 0 15 0 | 0 15 0 |
| (9) Attendance on a reporter with proceedings and getting him to accept remit . . . | 0 3 4 | 0 5 0 |
| (10) Attendance on commissioner or reporter fixing diet of proof or examination of havers, and intimating same to opposite agent, and writing certificate of intimation . . . . | 0 5 0 | 0 6 8 |
| (11) Attendance on reporter or commissioner, getting up his report with productions, etc., and paying his fee . . . . | 0 3 4 | 0 5 0 |

13. *Correspondence, etc.*

| | | |
|---|---|---|
| (1) Each letter, not exceeding one page of 125 words . . . | 0 2 0 | 0 3 4 |

| | Scale I. | | | Scale II. | | |
|---|---|---|---|---|---|---|
| (2) Exceeding one page and not exceeding two | £0 | 3 | 4 | £0 | 5 | 0 |
| (3) For each page, or part of a page, beyond two | 0 | 1 | 6 | 0 | 2 | 6 |
| (4) Formal letters (such as intimating a diet or transmitting a paper) to be charged, each | 0 | 1 | 0 | 0 | 1 | 6 |
| (5) Each telegram and telephone (including transmitting and any letter confirming) | 0 | 3 | 4 | 0 | 5 | 0 |
| (6) Framing each circular | 0 | 2 | 0 | 0 | 3 | 4 |
| (7) Each copy thereof | 0 | 1 | 0 | 0 | 1 | 0 |
| (*a*) To be printed if found to be less expensive than copying. | | | | | | |
| (8) Addressing and despatching circulars, not exceeding 20 | 0 | 1 | 6 | 0 | 2 | 0 |
| (*b*) If more in number, at same rate. | | | | | | |
| (9) Ordering advertisements, etc., each paper, including settlement of newspaper account | 0 | 2 | 0 | 0 | 3 | 4 |
| 14. *Miscellaneous.* | | | | | | |
| (1) Instructing medical man to report on party's injuries to enable action to be raised | 0 | 3 | 4 | 0 | 5 | 0 |
| (2) Taking protestation for not enrolling or insisting in the action | 0 | 2 | 6 | 0 | 3 | 4 |
| (3) Where a party has been ordered to find caution or to sist a mandatory, inquiring if such has been done | 0 | 2 | 6 | 0 | 3 | 4 |
| (4) Taking out bond of caution, getting it signed, and returning it to Clerk of Court | 0 | 3 | 4 | 0 | 6 | 8 |
| (5) Procuring bond attested where necessary | 0 | 2 | 0 | 0 | 3 | 4 |
| (6) Enrolling motion and intimating same to opposite agent, where only one agent | 0 | 1 | 6 | 0 | 2 | 6 |
| (7) For each other agent | 0 | 0 | 6 | 0 | 0 | 6 |
| (8) Where a paper, document, or article is ordered or required to be lodged. Inquiring if the same has been done. Only to be charged once | 0 | 2 | 0 | 0 | 2 | 6 |
| (9) Lodging the same, and productions made therewith | 0 | 2 | 0 | 0 | 2 | 6 |
| (10) Borrowing and returning a process of not more than 40 numbers | 0 | 1 | 6 | 0 | 2 | 3 |
| (11) Above 40 and not exceeding 100 | 0 | 3 | 0 | 0 | 4 | 6 |
| (12) Above 100 | 0 | 4 | 6 | 0 | 6 | 0 |
| (*a*) If only a part of a process is borrowed, the charge to be according to the number of parts borrowed. | | | | | | |

| | Scale I. | Scale II. |
|---|---|---|
| (13) Ordering a caption for the return of a process and intimating same to opposite agent . . . | £0 2 6 | £0 3 4 |
| (14) If the process is not returned after intimation by the Clerk of Court, procuring caption and instructing officer to execute . . . | 0 2 6 | 0 3 4 |

(*b*) When the caption is enforced, the above fees to be paid by the party against whom it is directed, with the Clerk of Court and officer's fees, the several fees being printed or marked on the back of the caption.

| | | |
|---|---|---|
| (15) Meeting with opposite agent and adjusting correspondence to be lodged in process, charge as in section 12 (1). | | |
| (16) Lodging same . . . | 0 2 0 | 0 2 6 |
| (17) For meetings and correspondence between the agents leading up to a settlement by joint minute, the Auditor shall allow such reasonable charges as the circumstances of the case may warrant, besides the drawing or revising fees of the minute. | | |
| (18) Perusing and considering tender made and consulting with client as to its acceptance . . . | 0 6 8 | 0 10 0 |
| (19) Perusing and considering specification of documents called for, and motion to approve of same . | 0 5 0 | 0 6 8 |
| (20) Where, after specification approved of, parties agree as to the documents to be produced without the necessity of appearing before the Court or a commissioner, charges to be allowed for meetings and correspondence as per sections 12 (1) and 13. | | |
| (21) Instructing architect to make plan, or a photographer to take photograph, and examining same; also, instructing skilled witnesses where certified by the Court, for each witness . . . . | 0 6 8 | 0 10 0 |

(*c*) No allowance shall be made for preparing plans or photographs lodged in process except such as are either ordered or prepared by mutual arrangement of parties, or proved and put in at the trial or proof, or subsequently sanctioned by the Court.

| | Scale I. | Scale II. |
|---|---|---|
| (22) Lodging reports | £0 2 0 | £0 2 6 |
| (23) Perusing and considering reports | 0 5 0 | 0 6 8 |
| (24) Procuring the authentication of an interlocutor or order of the Court, where same necessary | 0 2 6 | 0 3 4 |
| (25) Noting any interlocutor or order (other than formal) not pronounced in presence of parties or their agents | 0 2 6 | 0 3 4 |
| (26) Ordering and examining letters of second diligence | 0 3 4 | 0 5 0 |
| (27) Instructing shorthand writer to attend at trial or proof, or at a diet before a commissioner, including settling account | 0 2 6 | 0 3 4 |
| (28) Inquiring as to cause at avizandum | 0 2 6 | 0 3 4 |

(*d*) This only to be once allowed for each time at avizandum.

| | | |
|---|---|---|
| (29) Lodging minute of Reference to Oath and intimating same when necessary | 0 2 0 | 0 2 6 |
| (30) Agency settling witnesses' fees, not to exceed | 0 6 8 | 0 10 0 |
| (31) Obtaining concurrence of Procurator-Fiscal | 0 2 6 | 0 3 4 |
| (32) Inquiring if appeal lodged | 0 2 6 | 0 3 4 |
| (33) Marking appeal to the Sheriff or Court of Session | 0 2 6 | 0 3 4 |
| (34) Instructing Edinburgh agent to attend to appeal, and sending documents connected therewith | 0 6 8 | 0 10 0 |

15. *Debates.*

| | | |
|---|---|---|
| (1) Debating case on preliminary pleas, or on question of procedure or interim interdict when debate ordered by the Court | From 0 10 6 to 1 11 6 | From 1 1 0 to 2 12 6 |

(*a*) If, however, the whole case is decided on the debate, fees under (2) to be allowed.

| | | |
|---|---|---|
| (2) Debating case on merits | From 1 1 0 to 2 2 0 | From 2 2 0 to 4 4 0 |

(*b*) Where all the agents engaged in a case have to travel more than five miles to the Court of Appeal in the same county from the Court where the case was tried, an additional allowance of 10s. while engaged in travelling, besides outlays to be made to each agent.

| | Scale I. | Scale II. |
|---|---|---|
| 16. *Where Counsel employed.* | | |
| (*a*) The following fees to be allowed as judicial costs where the employment of counsel is sanctioned, but even when sanctioned, instructions to counsel, unless in cases of exceptional importance (such as a test case), to be limited in party and party taxation to appearances in Court. | | |
| Instructing Counsel— | | |
| (1) Letter or attendance, with fee of £1, 1s. or £2, 2s. | £0 5 0 | £0 6 8 |
| (2) Exceeding £2, 2s. and not exceeding £5, 5s. | 0 6 8 | 0 10 0 |
| (3) Exceeding £5, 5s. | 0 10 0 | 0 13 4 |
| Revising papers drawn by counsel. The charge to be according to the length of the papers as finally lodged. | | |
| (4) Not exceeding 10 sheets, each sheet | 0 1 0 | 0 1 0 |
| (5) Each sheet thereafter | 0 0 6 | 0 0 6 |
| (6) Attending diet of trial or proof or commission, and diet of debate with counsel, charges as in section 12 (1). | | |
| (7) Copy record and productions so far as necessary for counsel, per sheet | 0 1 0 | 0 1 6 |
| (8) Consultation with counsel before trial or proof, charges as in section 12 (1). | | |
| (*b*) Only one consultation in course of case to be included in judicial costs; but where counsel employed both before Sheriff-Substitute and on appeal before Sheriff-Principal and there is a second consultation, fee therefor to be chargeable by the agent against his client. | | |
| 17. *Process Fee.* | | |
| This fee to cover all consultations between agent and client during the progress of the cause, and all communications written or verbal passing between them | From 0 10 6 to 1 1 0 | From 1 1 0 to 2 2 0 |
| 18. *Extracts.* | | |
| Ordering, procuring, and examining extracts, interim or otherwise | 0 3 4 | 0 6 8 |
| 19. *Personal Diligence.* | | |
| (1) Recording execution of charge | 0 2 6 | 0 3 4 |
| (2) Procuring fiat | 0 2 0 | 0 3 4 |
| (3) Instructing apprehension | 0 3 4 | 0 5 0 |
| (4) Framing state of debt and attendance at settlement | 0 5 0 | 0 6 8 |

| | Scale I. | Scale II. |
|---|---|---|
| 20. *Sales.* | | |
| (1) Reporting sales under poindings or sequestrations, or any other judicial sales, including approval of roup roll | £0 2 6 | £0 3 4 |
| (2) Obtaining warrant to pay | 0 3 4 | 0 5 0 |
| (3) Instructing auctioneer or officer to conduct sale and perusing report | 0 5 0 | 0 6 8 |

## Chapter II.—Jury Trials

| | |
|---|---|
| (1) Drawing and intimating motion (including copy), to have cause tried by jury | 0 6 8 |
| (2) Attendance before court discussing questions of fact to be submitted to jury, charges as in Chap. I. sect. 12 (1). | |
| (3) Lodging inventory of documents | 0 2 6 |

(*a*) No charge to be allowed for productions made in course of trial.

| | |
|---|---|
| (4) Making copies for use of Sheriff, agents, and jury of questions of fact proponed | 0 10 0 |
| (5) Attendance at and conducting trial, at rate per whole day of | 4 4 0 |
| (6) If motion for application of verdict not made at close of trial, then lodging and intimating motion to apply verdict | 0 3 4 |
| (7) Making motion to apply verdict | 0 6 8 |
| (8) Ordering and uplifting extract | 0 6 8 |

(*b*) Notes as to similar work in ordinary cases to apply. If the verdict is for less than £50, only half of the foregoing fees to be allowed as judicial costs.

## Chapter III.—Mercantile Sequestrations

| | |
|---|---|
| (1) Taking instructions to apply for sequestration and writing mandate | 0 10 0 |
| (2) Obtaining deliverance on petition | 0 6 8 |
| (3) Drawing abbreviate of sequestration, and getting same entered in register of inhibitions | 0 10 0 |
| (4) Drawing advertisement for *Gazette*, per sheet | 0 6 0 |
| (5) Instructing insertion | 0 3 4 |
| (6) Attending meeting of creditors and of trustee and commissioners for first hour | 1 1 0 |
| (7) For every hour after | 0 10 6 |

| | | | |
|---|---|---|---|
| (8) Writing minutes of meeting where not written during meeting, per sheet. | £0 | 6 | 0 |
| (9) Writing minutes of meeting where written during meeting, per sheet | 0 | 2 | 0 |
| (10) Lodging process with Sheriff-Clerk, and obtaining deliverance declaring election of trustee and commissioners . . . | 0 | 6 | 8 |
| (11) Taking out bond of caution for trustee, and getting it signed, and lodging same . . . | 0 | 10 | 0 |
| (12) Taking out act and warrant, and transmitting same to Accountant in Bankruptcy . . . | 0 | 10 | 0 |
| (13) Drawing abbreviate for Register of Adjudications, and copying and recording same . . . | 0 | 10 | 0 |
| (14) Engrossing proceedings in sederunt book, per sheet . . . | 0 | 1 | 6 |

(*a*) No charges shall be allowed for making engrossments in the sederunt book after the confirmation of the trustee.

(*b*) All other charges in sequestrations to be at the same rates for similar or analogous work under Scale II. for general business. Attendance at examination of bankrupt and other parties to be charged as in Chapter I. section 12 (1).

### Chapter IV.—Cessio Proceedings

| | | | |
|---|---|---|---|
| (1) Taking instructions. . . . | 0 | 10 | 0 |
| (2) Procuring warrant on petition . | 0 | 5 | 0 |

(*a*) All other charges in cessios, including diligence fees, constituting notour bankruptcy, to be charged under Scale I. of this table unless where the gross realised assets amount to £200 or upwards, when such charges shall be allowed under Scale II.

(*b*) All engrossments in the sederunt book other than those requiring to be made before the trustee is appointed, arranging as to second meeting of creditors, drawing *Gazette* and advertisement notices, and all work of a like nature to be done by the trustee.

### Chapter V.—Executry Business

(So far as not falling under this Chapter to be charged under Scale II.)

| | | | |
|---|---|---|---|
| (1) Presenting petition for decree-dative and directing publication. . | 0 | 6 | 8 |
| (2) Attendance in Court moving for decree-dative . . . | 0 | 6 | 8 |

(3) Agency making the necessary preliminary investigation in order to ascertain the particulars and value of the intestate moveable estate passing on death, and the debts and encumbrances affecting the estate, including correspondence, attendances, perusal of deeds, and other documents, and obtaining valuations.

(*A*) On small estates under the Small Estates and Finance Acts up to £500.

| | | | |
|---|---|---|---|
| Not exceeding £100 . . | £0 | 10 | 6 |
| Above £100 and not exceeding £300 . . . | 1 | 1 | 0 |
| Above £300 and not exceeding £500 . . . | 1 | 11 | 6 |

This fee shall cover all trouble up to and inclusive of procuring confirmation.

(*B*) On estates—

| | | | | | | |
|---|---|---|---|---|---|---|
| Above | £500 | and not exceeding | £1,500 | 2 | 2 | 0 |
| „ | 1,000 | „ | 3,000 | 3 | 3 | 0 |
| „ | 3,000 | „ | 5,000 | 4 | 4 | 0 |
| „ | 5,000 | „ | 7,000 | 5 | 5 | 0 |
| „ | 7,000 | „ | 10,000 | 6 | 6 | 0 |
| „ | 10,000 | „ | 15,000 | 7 | 7 | 0 |
| „ | 15,000 | „ | 20,000 | 8 | 8 | 0 |
| „ | 20,000 | „ | 25,000 | 9 | 9 | 0 |
| „ | 25,000 | „ | 35,000 | 10 | 10 | 0 |
| „ | 35,000 | „ | 50,000 | 15 | 15 | 0 |
| „ | 50,000 | „ | 75,000 | 21 | 0 | 0 |
| „ | 75,000 | „ | 100,000 | 26 | 5 | 0 |
| „ | 100,000 | „ | 150,000 | 36 | 15 | 0 |
| and for each additional £50,000 or part of £50,000 . . | | | | 10 | 10 | 0 |

with the option to the agent to charge for work in detail, but in that event no *ad valorem* fees for procuring confirmation shall be chargeable.

(*C*) On estate falling to be aggregated in respect of which duty is not payable by client, one-half of the above fees under (3) (*B*).

(4) Preparing and giving up inventory, accounts, and relative schedules, affidavits, and abstracts, and the other documents required to be lodged for payment of estate duty.

| | |
|---|---|
| Drawing, per sheet . . | £0 8 0 |
| Extending . . . | 0 2 0 |

(*a*) Correspondence with and attendance at Inland Revenue getting accounts passed, and duties paid to be allowed in addition.

| | |
|---|---|
| (5) Confirmation of executor — For carrying through same half of fees under (3) (*B*), but not to exceed £10, 10s. | |
| (6) Attendance with executor before Sheriff or Justice of Peace, when oath taken . . . | 0 6 8 |
| (7) Taking out bond of caution, getting it signed, and lodging it with Clerk of Court . . . . | 0 10 0 |
| (8) Procuring attestation of cautioner's sufficiency . . . | 0 5 0 |
| (9) Where caution found through the medium of a guarantee association, for all the work connected therewith . . . . | 1 1 0 |
| (10) Fee on interlocutor on petition for restriction of caution, ordering advertisement . . . | 0 6 8 |
| (11) Drawing advertisement and copy . | 0 7 6 |
| (12) Instructing advertisement . . | 0 3 4 |
| (13) Fee on interlocutor restricting or refusing to restrict caution . | 0 6 8 |

## Chapter VI.—Accounts of Expenses

| | Scale I. | Scale II. |
|---|---|---|
| (1) Framing account of expenses, per sheet . . . . | £0 1 6 | 0 2 0 |
| (2) Lodging account of expenses with Auditor, getting diet fixed and intimating same, with copy of accounts to the opposite agent . | 0 3 4 | 0 5 0 |
| (3) Perusing account of opposite agent, taking notes, and preparing for taxation . . . . | 0 3 4 | 0 5 0 |
| (4) Attending taxation, charges as in Chap. I. sect. 12 (1). | | |
| (5) Lodging the account with the Clerk of Court for approval . . | 0 2 0 | 0 2 6 |
| (6) Noting the approval thereof . | 0 2 0 | 0 3 4 |
| (7) Preparing and lodging note of objections to the Auditor's report . | 0 5 0 | 0 10 0 |
| (8) Attendance discussing same, charges as in (4). | | |

## Chapter VII.—Small Debt Cases

| | | | |
|---|---|---|---|
| (1) Uncontested Cases, — if Sheriff allows fees. Taking out summons and drawing claim where that necessary, making copy, and attendance at calling . | £0 | 5 | 0 |
| (*a*) Where the case is settled before calling, two-thirds of the above fee may be authorised against the defenders. | | | |
| (2) Contested Cases,—if Sheriff allows fees. Fees as in (1), and for conduct of the case, per hour . . . | 0 | 5 | 0 |
| (*b*) Cases shall be considered contested only where the defender appears or is represented, and states a defence. | | | |
| (3) Where a case is remitted to the Ordinary Court roll, there shall be allowed to cover the procedure anterior to the remit a fee not exceeding . . . | 1 | 1 | 0 |
| (4) When a case is remitted under rule 61 of the Sheriff Courts Act, 1907, to be dealt with under the provisions of the Small Debt Acts, there shall be allowed for the trial of the case to cover all trouble thereafter a fee of . . | 1 | 1 | 0 |
| (5) Fees of diligence in terms of Scale I. of sections 6 and 19 of Chapter I. so far as applicable to diligence. | | | |
| (*c*) Unless where the case is transferred to the ordinary roll, or the Sheriff shall otherwise order, judicial fees, if allowed, shall not exceed one-fifth of the sum sued or decerned for, but with a minimum fee of 2s. 6d. in uncontested cases and 7s. 6d. in contested cases. Necessary outlays also to be allowed. | | | |
| (*d*) In all cases it shall be in the power of the Sheriff, if he shall think proper, to allow a fee not exceeding five shillings per hour for taking instructions and seeing witnesses; and in very special cases he may allow a fee to the successful party not exceeding two guineas for the conduct of the cause, and in that event the like fee shall be chargeable to his client by the agent of the unsuccessful party. | | | |

## Chapter VIII.—Fees to Clerks of Counsel

| | | | |
|---|---|---|---|
| (1) Where counsel's fee is £1, 1s. . | 0 | 2 | 6 |
| Where £2, 2s. to £4, 4s. . | 0 | 5 | 0 |
| Where £5, 5s. to £10, 10s. . | 0 | 7 | 6 |

| | | | |
|---|---|---|---|
| Where above £10, 10s., five per cent. on the amount. | | | |
| (2) For writing draft, per sheet . | £0 | 0 | 9 |
| For writing opinion, including draft fair copy, and booking, per sheet . . . . | 0 | 1 | 6 |

CHAPTER IX.—SHORTHAND WRITERS' FEES

| | | | |
|---|---|---|---|
| (1) Attending at trials, proofs, and commissions where notes extended, per hour . . . . | 0 | 5 | 0 |
| (2) Attending at trials, proofs, and commissions where notes not extended, per hour . . . . | 0 | 6 | 8 |
| (3) Besides reasonable travelling expenses where necessary. | | | |
| (4) Extending notes, per sheet . . | 0 | 1 | 6 |

CHAPTER X.—WITNESSES' FEES

| | | | |
|---|---|---|---|
| | From | | |
| (1) Labourers, mechanics, servants, journeymen, etc., per day, according to circumstances . . | 0 | 5 | 0 |
| | to | | |
| | 0 | 7 | 6 |
| | From | | |
| (2) Tradesmen, shopkeepers, innkeepers, clerks, farmers, manufacturers, auctioners, etc., per day, according to circumstances . . . | 0 | 10 | 0 |
| | to | | |
| | 1 | 1 | 0 |
| (3) Gentlemen, merchants, bankers, clergymen, etc., per day . . | 1 | 1 | 0 |
| (4) Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, civil engineers, surveyors, etc., per day . . . . | 2 | 2 | 0 |

(5) Women. The above classification and scale of fees shall apply to women as well as men.

(*a*) Where less than a day is occupied, a corresponding reduction shall be made in the fees allowed.

(*b*) Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons, of such amount as shall appear fair and reasonable, provided that the judge who tries the cause shall, on a motion made either at the proof or trial, or when leave is asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons of such charges.

(*c*) Witnesses shall be allowed at the above rates for the time necessarily occupied by them in going to, re-

maining at, and returning from the place of trial or proof, besides reasonable travelling charges according to their rank and station in life.

(*d*) Charges for witnesses present at a trial or proof, but not examined, nor held as concurring with a witness who has been examined, may be allowed, provided a motion to that effect is made at the close of the proof, and the Court, then or subsequently, grants the same, and the witnesses' names are noted. Unless this is done, the Auditor shall disallow any charges made for such witnesses.

(*e*) The witnesses' fees stated in this table do not apply to witnesses in Small Debt cases not sent to the ordinary roll; in such cases the Sheriff, or, failing his doing so, the Sheriff-Clerk, shall fix the witnesses' fees.

(*f*) The charges for witnesses to be stated in the body of the account in a slump sum, and the details of the charges to be stated in the separate schedule appended to the account, as follows:—

| Witnesses' Names and Designations. | Where from. | Number of Days charged. | Rate per Day. | Total Sum charged. | Taxed off by Auditor. |
|---|---|---|---|---|---|
| | | | | | |

Receipts or vouchers for all the sums stated as paid to witnesses to be produced to the Auditor at the taxation.

### Chapter XI.—Auditors' Fees

| | | | |
|---|---|---|---|
| (1) Decrees in absence . . . | £0 | 2 | 6 |
| (2) Cases where appearance entered— | | | |
| Where the amount of the account as submitted is under £5 . | 0 | 2 | 6 |
| £5 and under £20 . . | 0 | 5 | 0 |
| £20 and under £50 . . | 0 | 7 | 6 |
| £50 and under £75 . . | 0 | 10 | 0 |
| £75 and under £100 . . | 0 | 15 | 0 |
| £100 and under £150 . . | 1 | 1 | 0 |
| £150 and under £200 . . | 1 | 11 | 6 |
| £200 and under £300 . . | 2 | 2 | 0 |
| For every additional £100 or part of £100 . . . | 1 | 1 | 0 |

### Chapter XII.—Procurator-Fiscals' Fees

| | | | |
|---|---|---|---|
| For granting concurrence, . . | 0 | 3 | 4 |

Dunedin, *I.P.D.*

3. *Act of Sederunt anent Appeals from the Sheriff Court and the Procedure for the Remission of Causes to the Court of Session, under Sections* 5 *and* 30 *of the Sheriff Courts (Scotland) Act*, 1907.

[*Edinburgh*, 5*th January* 1909.]

The Lords of Council and Session, by virtue of the powers conferred on them by section 40 of the Sheriff Courts (Scotland) Act, 1907, do Enact and Declare as follows:—

1. The provisions of the Act of Sederunt of 10th March 1870, with regard to appeals as to printing, boxing, lodging, etc., shall apply to appeals (other than appeals against interlocutors applying verdicts of juries in the Sheriff Court) under the said Act.

2. The provisions of the said Act of Sederunt of 10th March 1870, with regard to appeals as to printing, boxing, lodging, etc., shall apply to appeals against interlocutors applying verdicts of juries in the Sheriff Court, provided that it shall not be necessary to print any notes of the evidence unless an order shall be made by the Appellate Court appointing the same to be printed.

3. In appeals against interlocutors applying verdicts of juries in the Sheriff Court, when the Appellate Court shall order a new trial, it shall be the duty of the party wishing to proceed with the cause in the Sheriff Court to furnish the Sheriff Clerk with a certified copy of the Court of Session interlocutor making such order.

4. Applications for remission of causes to the Court of Session under the provisions of sections 5 and 30 of the said Act shall from the date hereof be made in the following manner:—

(1) The party desiring the cause to be remitted shall cause to be written upon the interlocutor sheet in the Sheriff Court a note in the following terms: "The pursuer (or defender or other party) requires the cause to be remitted to the Division of the Court of Session," and the said note shall specify the Division and shall be signed by the party making the application, or his agent, and shall bear the date on which it is signed.

(2) The clerk of the Inferior Court shall within two days after the date of such application being made, send written notice of such application to the opposite party, or his agent, provided that the failure to give such notice shall not invalidate the remission, but the Court of Session may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.

(3) Where such application shall have been made, or in cases where the Sheriff has *ex proprio motu* under the provisions of section 5 of said Act pronounced an interlocutor remitting the cause to one of the Divisions of the Court of Session, the clerk of the Inferior Court shall within two days thereafter transmit the process to the clerk of the Division of the Court to which the cause is remitted, who shall write on the interlocutor sheet a note of the day on which it is received.

(4) Upon the process being so remitted the same regulations as to printing, boxing, lodging, etc., shall apply as are contained with regard to appeals in the said Act of Sederunt of 10th March

1870, with this qualification, that in the event of an application for a remission of the cause being abandoned, or held to be abandoned, the docquet written by the clerk of court or his assistant shall be in the following terms: "Retransmitted in respect of the abandonment of the application for a remit to the Court of Session." In cases remitted *ex proprio motu* by the Sheriff, the pursuer or party leading in the cause shall act as if he were appellant, and the other party to the cause shall be considered the respondent under the said Act of Sederunt.

(5) Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted parties will be heard upon any motion made to retransmit the cause to the Sheriff Court, or directed against the competency of the remission; and if the motion to retransmit be refused, and the remission held competent, the mode and course of further procedure in the cause (including all questions as to its competency or relevancy) will thereafter be determined by the said Division in the Single Bills or in the Summar Roll as they may think fit.

5. The regulations above set forth shall be observed and come in place of the provisions in paragraph 95 of the First Schedule of the said Sheriff Courts Act, and the Act of Sederunt of 14th April 1908 is hereby repealed.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

DUNEDIN, *I.P.D.*

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4. *Act of Sederunt regulating the Fees of Sheriff Officers in the Sheriff Courts in Scotland.* [*Edinburgh, 15th October* 1908.]

THE Lords of Council and Session, considering that by section 40 of the Sheriff Courts (Scotland) Act, 1907, it is provided that—

The Court of Session may from time to time, by Act of Sederunt, make such regulations not inconsistent with the provisions of this Act as may be necessary for carrying into effect the purposes thereof for regulating the practice of the Sheriff Courts (including diligence and procedure under the Small Debt Acts); and for regulating the fees of agents, officers, shorthand writers, and others, and, with the concurrence of the Treasury, for regulating the fees of Court; and for altering, amending, or adding to the rules of procedure in the first schedule hereto: Provided that at least two weeks before the same is signed the terms of the proposed Act of Sederunt shall be published in the *Edinburgh Gazette* and at least two other newspapers in Scotland: Provided also that every such Act of Sederunt shall, within one week from the date thereof, be transmitted by the Lord President of the Court of Session to the Secretary for Scotland, in order that it may be laid before the Houses of Parliament; and if either of the Houses of Parliament shall within thirty-six days after it has been laid before them resolve that the whole or any part of such Act of Sederunt ought not to continue in force, the

whole or such part thereof as shall be included in such resolution as shall from and after the date of the passing of such resolution cease to be binding.

And considering that in consequence of the alterations on the forms of process introduced by the said Act it is expedient to alter the Fees allowed to Sheriff Officers by the Act of Sederunt of 2nd June 1837, and other Acts of Sederunt, and by the Small Debt and other Acts: Do therefore, in virtue of the powers conferred by the said Act of Parliament, provide and enact that, in place of the Fees allowed as aforesaid, the Table of Fees hereto annexed shall, from and after the 1st October 1908, regulate the Fees of Sheriff Officers in the Sheriff Courts in Scotland, until the same shall be altered by the Court; and the Lords appoint this Act and the Table of Fees hereto annexed to be engrossed in the Books of Sederunt and printed and published in common form.

DUNEDIN, *I.P.D.*

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## TABLE OF FEES FOR SHERIFF OFFICERS

| | | | |
|---|---|---|---|
| 1. *Citations and Attendances.* | | | |
| (1) Serving Petition, Complaint, Minute, Interlocutor, Warrant or Intimation, Charging on Decree or Extract Registered Protest, or using Arrestment, or Citing for Examination, for each of these several acts, including the Return of Execution | £0 | 2 | 6 |
| (2) Executing against more than one person on the same Warrant when a separate execution not necessary, each copy after the first | 0 | 1 | 0 |
| (3) Citing a Witness for Ordinary Court | 0 | 1 | 6 |
| (4) Citing every other witness after the first, when only one Execution necessary | 0 | 1 | 0 |
| The above to include short Copies of Citation and returning Executions. | | | |
| (5) Attending the Proof or Examination of Parties or Witnesses—Officer, for first hour | 0 | 2 | 6 |
| (6) For each hour or part of an hour thereafter | 0 | 1 | 6 |
| (7) Concurrents attending in like manner, for first hour, each | 0 | 1 | 6 |
| (8) For each other hour or part of an hour thereafter | 0 | 1 | 0 |
| 2. *Brieves.* | | | |
| (1) Publishing a Brieve of Service | 0 | 5 | 0 |
| (2) Attendance, first hour—Officer | 0 | 2 | 6 |
| (3) Witness | 0 | 1 | 6 |
| (4) For each other hour or part of an hour thereafter, for Officer and Witness | 0 | 2 | 6 |
| 3. *Poindings.* | | | |
| (1) When the appraised value on an Ordinary Court Decree or Extract Registered Protest does not exceed £5 | 0 | 5 | 0 |

| | | | |
|---|---|---|---|
| (2) Exceeds £5 but does not exceed £10 | £0 | 7 | 6 |
| (3) Exceeds £10 but does not exceed £20 | 0 | 12 | 6 |
| (4) Exceeds £20 but does not exceed £35 | 0 | 15 | 0 |
| (5) Exceeds £35 but does not exceed £50 | 0 | 17 | 6 |
| (6) Exceeds £50 but does not exceed £100 | 1 | 5 | 0 |
| (7) Exceeds £100, then in proportional amounts as above for each additional £100 or part thereof, but in no case the charge to exceed £2. | | | |
| (8) Framing and extending Schedule and also Execution, for each sheet of 250 words or part thereof | 0 | 1 | 0 |

4. *Sequestrations for Rent and Poindings of the Ground.*

| | | | |
|---|---|---|---|
| (1) Inventorying Sequestrated Effects, or Moveables on a Writ of Poinding of the Ground, and executing Warrant to open when necessary, when the sum to be secured does not exceed £20 | 0 | 10 | 0 |
| (2) Exceeds £20 but does not exceed £50 | 0 | 15 | 0 |
| (3) Exceeds £50 but does not exceed £100 | 1 | 5 | 0 |
| (4) Exceeds £100, then in proportional amounts as above for each additional £100 or part thereof, but in no case the charge to exceed £2. | | | |
| (5) Extending Inventory and Execution, each per sheet | 0 | 1 | 0 |

5. *Ejections.*

| | | | |
|---|---|---|---|
| (1) Ordinary—same Fees as in Sequestrations. | | | |
| (2) Summary—(*a*) Serving Complaint | 0 | 2 | 6 |
| (3) (*b*) Ejecting each Defender | 0 | 5 | 0 |

6. *Travelling, Detention, Outlays, etc.*

| | | | |
|---|---|---|---|
| (1) For each mile or part of a mile from the Court-House where Warrant granted to the place of execution—Officer | 0 | 0 | 8 |
| (2) Witnesses and Appraisers, each | 0 | 0 | 6 |
| (3) For each hour or part of an hour after the first two that Officer and Witness or Assistant are detained at a Poinding, Sequestration, or ejection, but not to exceed in all 15s. per day of eight hours | 0 | 2 | 6 |
| (4) Attending Sale of Sequestrated or Poinded Effects as Judge of Roup | 0 | 12 | 6 |
| (5) For each hour or part of an hour after the first two | 0 | 2 | 6 |
| (6) Add outlays for Locksmiths, etc. | | | |

7. *Small Debt Cases.*

| | | | |
|---|---|---|---|
| (1) Serving Summons, Sist, or Counterclaim | 0 | 1 | 6 |
| (2) Citing one Witness | 0 | 1 | 0 |
| (3) Every other Witness after the first | 0 | 0 | 9 |
| (4) Postage in addition. | | | |
| (5) Charge or Arrestment | 0 | 1 | 6 |
| (6) Post copies under (1) and (5) when necessary, each | 0 | 1 | 0 |

| | | | |
|---|---|---|---|
| (7) Postage in addition. | | | |
| (8) Poinding or Sequestration . . . | £0 | 3 | 6 |
| (9) Sale . . . . . | 0 | 3 | 6 |
| (10) Detention at a Sale, waiting for furniture, etc., being removed, and seeing house properly secured, for every hour after the first two, Officer and Witnesses, but not to exceed in all 15s. per day of eight hours . . . | 0 | 2 | 6 |
| (11) Any necessary outlays. | | | |
| (12) Carrying back, same fees as in (8) to (11). | | | |
| (13) Executing Warrant to Open . . . | 0 | 1 | 6 |
| (14) In addition to Locksmith's fees. | | | |
| (15) Detention, fees as in (10). | | | |
| (16) Granting Certificate of Displenishment . . | 0 | 1 | 0 |
| (17) Enrolling for Warrant to Eject and Relet and intimating diet to Defender . . . | 0 | 2 | 0 |
| (18) Each extra copy . . . . . | 0 | 1 | 0 |
| (19) Travelling, each mile or part thereof from Court-House—Officer . . . . | 0 | 0 | 8 |
| (20) Each Assistant . . . . . | 0 | 0 | 6 |
| (21) Arresting Vessel . . . . . | 0 | 10 | 6 |
| (22) Travelling, as in (19) and (20). | | | |

8. *Arresting Vessel.*

| | | | |
|---|---|---|---|
| (1) Arresting Vessel on Ordinary Court Warrant . | 1 | 1 | 0 |
| (2) Travelling, as in 7 (19) and (20). | | | |
| (3) Detention, for each hour or part thereof after the first two . . . . . | 0 | 2 | 6 |
| (4) Dismantling Vessel . . . . . | 1 | 11 | 6 |
| (5) With Travelling and Detention as above, and outlays for Skilled Artisans and Boat Hire. | | | |

9. *Apprehensions.*

| | | | |
|---|---|---|---|
| (1) Executing Warrant to Apprehend and lodging in prison . . . . . | 1 | 1 | 0 |
| (2) Detention, for each hour or part thereof after first two . . . . . | 0 | 2 | 6 |
| (3) Outlays, cab or other fare when necessary, and maintenance. | | | |
| (4) Taking prisoner from prison to Court-House for examination . . . . . | 0 | 10 | 6 |
| (5) While prisoner in custody, for each hour or part thereof after first two . . . . | 0 | 2 | 6 |
| (6) Travelling per mile or part thereof, Officer and Concurrent . . . . . | 0 | 2 | 6 |

### General Regulations

(1) When the Officer has to cross a ferry he will be allowed the necessary cost of the ferry, and, for mileage, to charge the breadth of the ferry and one-half more.

(2) Where the Officer can more expeditiously reach

his destination by railway or other public conveyance, he will only be allowed, for himself and assistant or witnesses, for time occupied after the first two hours, including time of travelling:—

| | | | |
|---|---|---|---|
| (1) Where within a radius of 5 miles from his place of business, per hour . . . . | £0 | 3 | 6 |
| (2) Where beyond such radius, per hour . . besides necessary outlays. | 0 | 5 | 0 |

(3) In no case shall any Officer be entitled (unless under special contract) to charge more than would be allowed to the Officer nearest to the Court-House from which the warrant or authority upon which he acts is issued.

# III. FORMS OF ACCOUNTS OF EXPENSES IN ORDINARY ACTION

[*Note.*—The charges are regulated by Act of Sederunt of 10th April 1908, printed in the Appendix. As to expenses generally, see Chapter XXXVII.]

## I. Undefended Action

| | Scale I. Not exceeding £50 | Scale II. Above £50. |
|---|---|---|
| Taking instructions | £0 13 4 to 1 11 6 | £1 1 0 to 2 2 0 |
| Drawing writ, per sheet | 0 4 4 | 0 6 0 |
| Fair copy writ, per sheet | 0 1 0 | 0 1 6 |
| Copy account annexed | 0 1 6 | 0 2 0 |
| Sheriff-Clerk's dues | 0 5 0 | 0 5 0 |
| Copy writ and account for service, per sheet | 0 0 6 | 0 0 9 |
| Do. warrant, per sheet | 0 1 0 | 0 1 6 |
| Instructing officer to serve | 0 2 6 | 0 3 4 |
| Paid his fees | | |
| *Or* agency serving by post | 0 2 6 | 0 2 6 |
| Framing account of expenses, per sheet | 0 1 6 | 0 2 0 |
| Copy, per sheet | 0 1 6 | 0 2 0 |
| Lodging for taxation | 0 3 4 | 0 5 0 |
| Attending diet of taxation | 0 5 0 | 0 6 8 |
| Paid Auditor's fees | | |
| Framing minute craving decree | 0 5 0 | 0 6 8 |
| Copy thereof | | |
| Attendance obtaining decree in absence | 0 5 0 | 0 6 8 |
| Ordering, procuring, and examining extract | 0 3 4 | 0 6 8 |
| Process fee | 0 10 6 | 1 1 0 |
| Posts and incidents | 0 1 0 | 0 2 0 |
| Bar officer's fee | 0 1 0 | 0 2 0 |

## 2. Defended Action

| | | |
|---|---|---|
| Taking instructions | 0 13 4 to 1 11 6 | 1 1 0 to 2 2 0 |
| Instructing medical man to report in action arising out of personal injury | 0 3 4 | 0 5 0 |

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| Paid his fee | | |
| Considering report, per sheet | £0 2 0 | £0 3 0 |
| Drawing writ, do. | 0 4 0 | 0 6 0 |
| Copy writ, per sheet | 0 1 0 | 0 1 6 |
| Copy account endorsed thereon, per sheet | 0 1 6 | 0 2 0 |
| (If special order obtained, *e.g.* interim interdict or sequestration), lodging and procuring deliverance | 0 5 0 | 0 6 8 |
| Court fee | 0 5 0 | 0 5 0 |
| Copy writ and account for service, per sheet | 0 0 6 | 0 0 9 |
| Do. warrant to cite do. | 0 1 0 | 0 1 6 |
| Instructing officer to serve (additional 6d. each, beyond one party) | 0 2 6 | 0 3 4 |
| Paid his fees | | |
| *Or* agency serving by post | 0 2 6 | 0 2 6 |
| Certified copy writ, per sheet | 0 1 0 | 0 1 6 |
| Bar officer's fees | 0 1 0 | 0 1 0 |
| Drawing condescendence, per sheet | 0 4 0 | 0 6 0 |
| Fair copy, do. | 0 1 0 | 0 1 6 |
| Lodging same | 0 2 0 | 0 2 6 |
| Inquiring for defences | 0 2 0 | 0 2 6 |
| Borrowing process with defences and returning | 0 1 6 | 0 2 3 |
| Attendance calling:—order to revise, not exceeding half an hour | 0 5 0 | 0 6 8 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Drawing revised condescendence, per sheet | 0 2 0 | 0 3 0 |
| If answers are ordered—Drawing answers, per sheet | 0 4 0 | 0 6 0 |
| Fair copy, per sheet | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Framing Inventory of productions therewith per sheet | 0 2 0 | 0 3 0 |
| Fair copy | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Inquiries for revised defences | 0 2 0 | 0 2 6 |
| Borrowing and returning | 0 1 6 | 0 2 3 |
| Preparing for, and attendance at closing record | 0 10 6 to 1 1 0 | 1 1 0 to 2 2 0 |
| Court fee | 0 5 0 | 0 5 0 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Copy record for agent, per sheet | 0 1 0 | 0 1 6 |
| Copy record for Sheriff, do. | 0 0 6 | 0 0 9 |
| Copy productions lodged, do. | 0 1 0 | 0 1 6 |
| Debating case on preliminary pleas (or on procedure, when debate ordered) | 0 10 6 to 1 11 6 | 1 1 0 to 2 12 6 |
| Inquiries at avizandum, interlocutor making remit | 0 2 6 | 0 3 3 |

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| Copy interlocutor | £0 1 0 | £0 1 6 |
| Noting same | 0 2 6 | 0 3 4 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Copy interlocutor for reporter | 0 1 0 | 0 1 6 |
| Agency obtaining certified | 0 2 6 | 0 3 4 |
| Attendance on reporter with proceedings | 0 3 4 | 0 5 0 |
| Attendance at hearing before reporter, not exceeding one hour | 0 6 8 | 0 10 0 |
| Attendance getting up report | 0 3 4 | 0 5 0 |
| Paid his fees | | |
| Perusing and considering report | 0 5 0 | 0 6 8 |
| Lodging report | 0 2 0 | 0 2 6 |
| Drawing inventory of productions therewith, per sheet | 0 2 0 | 0 3 0 |
| Fair copy, per sheet | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Copy productions, per sheet | 0 1 0 | 0 1 6 |
| Enrolling and intimating | 0 1 6 | 0 2 6 |
| Attendance calling, parties appointed to be heard on report on debate roll | 0 5 0 | 0 6 8 |
| Debating case on report | 0 10 6 to 1 11 6 | 1 1 0 to 2 12 6 |
| Inquiries, interlocutor allowing proof | 0 2 6 | 0 3 4 |
| Noting same | 0 2 6 | 0 3 4 |
| Copy, per sheet | 0 1 0 | 0 1 6 |
| Copy for client (if questions of fact or law disposed of), per sheet | 0 0 6 | 0 0 9 |
| Enrolling and intimating | 0 1 6 | 0 2 6 |
| Attendance calling, diet of proof fixed | 0 5 0 | 0 6 8 |
| Copy interlocutor fixing diet, per sheet | 0 1 0 | 0 1 6 |
| Perusing and considering specification of documents called for by defender | 0 5 0 | 0 6 8 |
| Drawing specification of documents for pursuer, per sheet | 0 4 0 | 0 6 0 |
| Fair copy | 0 1 0 | 0 1 6 |
| Agency lodging | 0 2 0 | 0 2 6 |
| Copy for defender, per sheet | 0 0 6 | 0 0 9 |
| Enrolling and intimating | 0 1 6 | 0 2 6 |
| Attending calling, diligence and commission granted | 0 5 0 | 0 6 8 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Copy to be certified | 0 1 0 | 0 1 6 |
| Agency obtaining certified | 0 2 6 | 0 3 4 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Attendance on Commissioner fixing diet and intimating | 0 5 0 | 0 6 8 |
| Instructing officer to cite haver (each other haver after first, 6d. additional) | 0 2 6 | 0 3 4 |
| Paid his fees | | |
| *Or* agency citing havers (each haver after first, 1s.) | 0 1 6 | 0 1 6 |

| | Scale I. Not exceeding £50. | Scale II. Above £50 |
|---|---|---|
| Copies or excerpts of specifications for haver (each copy after first, one-half), per sheet | £0 1 0 | £0 1 6 |
| Attendance at examination, one hour | 0 6 8 | 0 10 0 |
| Paid fees to havers | | |
| Attendance settling same (not to exceed) | 0 6 8 | 0 10 0 |
| Attendance taking up report and productions | 0 3 4 | 0 5 0 |
| Paid Commissioner's and Clerk's fees | | |
| Perusing and considering report | 0 5 0 | 0 6 8 |
| Lodging report | 0 2 0 | 0 2 6 |
| Inventory of productions therewith, per sheet | 0 2 0 | 0 3 0 |
| Fair copy | 0 1 0 | 0 1 6 |
| Lodging same | 0 2 0 | 0 2 6 |
| *Or* if diligence not carried out, attendance on opposite agent examining papers falling under specification and arranging as to productions. Charges for meetings and correspondence as per table | | |
| Instructions for precognitions | 0 13 4 to 1 1 0 | 1 1 0 to 1 11 6 |
| Instructing architect for plan, or skilled witness for report | 0 6 8 | 0 10 0 |
| Drawing precognitions, viz. :— | | |
| A. B., pursuer, per sheet | 0 4 0 | 0 6 0 |
| C. D., do. | 0 4 0 | 0 6 0 |
| Revising and adjusting report by skilled witness, per sheet | 0 2 0 | 0 3 0 |
| Travelling and personal expenses precognoscing | | |
| Copy precognitions, per sheet | 0 1 0 | 0 1 6 |
| Enrolling for commission to take evidence | 0 1 6 | 0 2 6 |
| Inventory of productions | 0 2 0 | 0 3 0 |
| Fair copy | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Attendance calling, commission granted | 0 5 0 | 0 6 8 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Copy to be certified | 0 1 0 | 0 1 6 |
| Agency obtaining certified | 0 2 6 | 0 3 4 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Attendance on Commissioner fixing diet and intimating | 0 5 0 | 0 6 8 |
| Copy interlocutor fixing diet and getting certified | 0 3 4 | 0 5 0 |
| Instructing officer to cite | 0 2 6 | 0 3 4 |
| Paid his fees | | |
| Attendance at examination, one hour | 0 6 8 | 0 10 0 |
| Attendance on Commissioner, getting up report | 0 3 4 | 0 5 0 |
| Paid his fees and clerk | | |
| Perusing and considering report | 0 5 0 | 0 6 8 |
| Agency lodging | 0 2 0 | 0 2 6 |
| Inventory of productions therewith, per sheet | 0 2 0 | 0 3 0 |
| Copy | 0 1 0 | 0 1 6 |

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| Agency lodging | £0 2 0 | £0 2 6 |
| Copy interlocutor fixing diet of proof and getting certified | 0 3 4 | 0 5 0 |
| Instructing officer to cite witness (6d. additional for each party beyond the first) | 0 2 6 | 0 3 4 |
| Paid his fees | | |
| Instructing shorthand writer | 0 2 6 | 0 3 4 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Meeting with opposite agent adjusting correspondence to be lodged, half an hour | 0 5 0 | 0 6 8 |
| Preparing for proof | 0 13 4 to 1 1 0 | 1 1 0 to 1 11 6 |
| Copy productions, per sheet | 0 1 0 | 0 1 6 |
| Attendance at and conducting proof, per hour | 0 6 8 | 0 10 0 |
| Debating case | 1 1 0 to 2 2 0 | 2 2 0 to 4 4 0 |
| Court fee | 0 5 0 | 0 5 0 |
| Bar officer's fees, per hour | 0 1 0 | 0 1 0 |
| Shorthand writer's account (When notes extended, 5s. per hour and 1s. 6d. per sheet; when notes not extended, 6s. 8d. per hour.) | | |
| Paid witnesses' fees (see Table of Fees; Chap X., Appendix) | | |
| Paid architect for plans and report as sanctioned. | | |
| Agency settling witnesses' fees not to exceed | 0 6 8 | 0 10 0 |
| Inventory of productions lodged at proof, per sheet | 0 2 0 | 0 3 0 |
| Fair copy, per sheet | 0 1 0 | 0 1 6 |
| Inquiries at avizandum | 0 2 6 | 0 3 4 |
| Copy interlocutor, per sheet | 0 1 0 | 0 1 6 |
| Agency noting | 0 2 6 | 0 3 4 |
| Copy for client, per sheet | 0 1 0 | 0 1 6 |
| Enrolling to have employment of counsel and skilled witnesses certified | 0 1 6 | 0 2 6 |
| Attendance calling, motion granted | 0 5 0 | 0 6 8 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Inquiries for appeal | 0 2 6 | 0 3 4 |
| *Or* marking appeal | 0 2 6 | 0 3 4 |
| Court fees | 0 5 0 | 0 5 0 |
| (If appeal to Court of Session.) | | |
| Instructing Edinburgh agent, and sending documents | 0 6 8 | 0 10 0 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Making copy proof, per sheet | 0 1 0 | 0 1 6 |
| Making copy additional productions, per sheet | 0 1 0 | 0 1 6 |
| Inquiries; interlocutor appointing debate. | 0 2 6 | 0 3 4 |
| Noting same | 0 2 6 | 0 3 4 |

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| Debating case on appeal | £1 1 0 to 2 2 0 | £2 2 0 to 4 4 0 |
| Inquiries at avizandum, interlocutor adhering | 0 2 6 | 0 3 4 |
| Agency noting | 0 2 6 | 0 3 4 |
| Copy interlocutor, per sheet | 0 1 0 | 0 1 6 |
| Copy for client, do. | 0 1 0 | 0 1 6 |
| Borrowing and returning process | 0 1 6 | 0 2 3 |
| Framing account of expenses, per sheet | 0 1 6 | 0 2 0 |
| Fair copy, do. | 0 1 6 | 0 2 0 |
| Copy for opposite agent, do. | 0 0 6 | 0 0 9 |
| Lodging account fixing diet and intimating | 0 3 4 | 0 5 0 |
| Attendance at taxation, half an hour | 0 5 0 | 0 6 8 |
| Paid Auditor's fee (Table of Fees; Chap. XI., Appendix) | | |
| Enrolling | 0 1 6 | 0 2 6 |
| Attendance calling, report approved and decree granted | 0 5 0 | 0 6 8 |
| Copy interlocutor | 0 1 0 | 0 1 6 |
| Borrowing productions | 0 1 6 | 0 2 3 |
| Process fee | 0 10 6 to 1 1 0 | 1 1 0 to 2 2 0 |
| Ordering, procuring, and examining extract | 0 3 4 | 0 6 8 |
| Posts and incidents | | |

### If Case settled

| | | |
|---|---|---|
| Fee for meetings and correspondence between agents leading up to settlement—as Auditor may allow. | | |
| Drawing joint minute, per sheet | 0 4 0 | 0 6 0 |
| Copy, do. | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Enrolling | 0 1 6 | 0 2 6 |
| Attendance calling, decree in terms of minute or | 0 5 0 | 0 6 8 |
| Perusing and considering tender and consulting client | 0 6 8 | 0 10 0 |
| Drawing minute of acceptance, per sheet | 0 4 0 | 0 6 0 |
| Copy, do. | 0 1 0 | 0 1 6 |
| Lodging | 0 2 0 | 0 2 6 |
| Enrolling | 0 1 6 | 0 2 6 |
| Attendance calling—decree in terms of minute of tender | 0 5 0 | 0 6 8 |

### In Jury Trials

| | | |
|---|---|---|
| Drawing motion for jury trial and copy | | 0 6 8 |
| Enrolling | | 0 1 6 |

| | Scale I. Not exceeding £50. | Scale II. Above £50. |
|---|---|---|
| Court fee | | £1 0 0 |
| Attendance discussing questions of fact, half an hour | | 0 6 8 |
| Copies questions for Sheriff, agents, and jury | | 0 10 0 |
| Attendance at and conducting trial, per day | | 4 4 0 |
| Lodging and intimating motion to apply verdict | | 0 3 4 |
| Enrolling | | 0 1 6 |
| Attendance moving to apply verdict | | 0 6 8 |

*Note.*—If the verdict is for less than £50, only a half of the above fees are allowed as judicial costs.

IF COUNSEL EMPLOYED

(If counsel authorised, take in the following entries before the attendance at proof.)

| | | |
|---|---|---|
| Copy record, precognitions, and productions for counsel, per sheet | £0 1 0 | 0 1 6 |
| Instructing counsel for consultation :— | | |
| Fee £1, 1s. or £2, 2s. | 0 5 0 | 0 6 8 |
| Fee £3, 3s. to £5, 5s. | 0 6 8 | 0 10 0 |
| Above £5, 5s. | 0 10 0 | 0 13 4 |
| Paid fee to him and clerk | | |
| Attendance at consultation, half an hour | 0 5 0 | 0 6 8 |
| Instructing counsel to attend proof (as above) | | |
| Paid fee to him and clerk | | |

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